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1955

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London
HE INCORPORATED COUNCIL OF LAW REPORTING
FOR ENGLAND AND WALES

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Dec. 23. J. L. M. Clyde, Q.C., *appointed Lord Justice General and President of the Court of Session in Scotland.*

Dec. 31. W. R. Milligan, Q.C., *Solicitor-General for Scotland, appointed Lord Advocate.*

1955.

Jan. 11. William Grant, Q.C., *appointed Solicitor-General for Scotland.*

Jan. 24. The Rt. Hon. Sir Malcolm Macnaghten, *a Judge of the King's Bench Division from* 1928 *to* 1947, *died, aged* 86.

June 5. Lord Birnam, *a Judge of the Court of Session in Scotland, died, aged* 71.

July 1. Sir John Cameron, Q.C., *appointed a Senator of the College of Justice in Scotland.*

July 13. Lord Cooper of Culross, *sometime Lord Justice-General of Scotland and Lord President of the Court of Session, died, aged* 62.

The Mode of Citation of the Volumes of the *Law Reports* for 1955, is as follows:—

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Aff. affirmed
Appl. applied
Appr. approved
C. considered
D. disapproved
Dist. distinguished
E. explained
F. followed
N.F. not followed
O. overruled
Q. questioned
R. referred to in judgment
Rev. reversed

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Littlewood *v.* George Wimpey & Co. Ld. and British Overseas Airways Corporation	[1953] 2 Q.B. 501; [1953] 2 All E.R. 915	*Aff.*	170
Lloyd *v.* Grace, Smith & Co.	[1912] A.C. 716; 28 T.L.R. 547	*Appl.*	131, 144
Lloyd *v.* Mostyn	10 M. & W. 478	*Appl.*	197, 203
Lochgelly Iron Co. Ld. *v.* Fowler	1913 S.C. 810		28
London and North Eastern Railway Co. *v.* Berriman	[1946] A.C. 278; 62 T.L.R. 170; [1946] 1 All E.R. 255		328
Londonderry Presbyterian Church House Trustees *v.* Inland Revenue Commissioners	[1946] N.I. 178; 27 T.C. 431	*C.*	574, 588, 593, 610, 611, 614
Lorillard, *In re*	[1922] 2 Ch. 638; 38 T.L.R. 666	*Appr.*	491, 509
Loudon *v.* Ryder	[1953] 2 Q.B. 202; [1953] 1 All E.R. 741	*R.*	797
Lowe *v.* Adams	[1901] 2 Ch. 598; 17 T.L.R. 763		781
Lumley *v.* Gye	2 E. & B. 216	*R.*	483–5
Lynch *v.* Nurdin	1 Q.B. 39		554
Lyon *v.* Don Brothers, Buist & Co. Ld.	1944 S.C.(J.) 1	*R.*	774
M'Gillivray *v.* Hope	[1935] A.C. 1	*R.*	182
M'Govern *v.* H.M. Advocate	1950 S.C.(J.) 33		200
McArthur (W. & A.) Ld. *v.* State of Queensland	28 C.L.R. 530	*R.*	285
McArthur *v.* The King	[1943] 3 D.L.R. 225	*R.*	488
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McFarlane *v.* Hutton Bros. (Stevedores) Ld.	20 B.W.C.C. 222; 136 L.T. 547		6, 10
Macaulay, *In re*	Cyclostyled Reps., Nov. 23, 1951 (West Africa)	*Appr.*	108, 116, 118
Macduff, *In re*	[1896] 2 Ch. 451; 12 T.L.R. 452	*R.*	603, 604, 607
Macfarlane *v.* Leclaire	15 Moo.P.C. 181		643
Mackalley's Case	9 Co.Rep. 65b	*R.*	480
Mackay *v.* Ailsa Shipbuilding Co. Ld.	1945 S.C. 414	*R.*	760, 775, 777
MacManaway, *In re*	[1951] A.C. 161; 66 T.L.R. (Pt. 2) 808	*R.*	714, 726, 736
Magdalen College, Cambridge, Case	11 Co.Rep. 66b		672

Mahmoud and Ispahani, *In re*	[1921] 2 K.B. 716; 37 T.L.R. 489		783
Malcolm Brunker & Co. Ld. *v.* Waterhouse & Sons	24 T.L.R. 854		137
Maldonado, In the Estate of	[1954] P. 223; [1953] 2 All E.R. 1579		500
Mancini *v.* Director of Public Prosecutions	[1942] A.C. 1; 58 T.L.R. 25; [1941] 3 All E.R. 272	*Appl.*	206, 211
Mankin *v.* Scala Theadrome Co. Ld.	[1947] K.B. 257; 62 T.L.R. 728; [1946] 2 All E.R. 614		463
Marcus Clark & Co. Ld. *v.* The Commonwealth	87 C.L.R. 177		274
Mariette, *In re*	[1915] 2 Ch. 284; 31 T.L.R. 536	*R.*	600
Marples *v.* Bainbridge	1 Madd. 590		653
Marshal *v.* Crutwell	L.R. 20 Eq. 328		436
Marshall or Wilkinson *v.* Marshall	[1943] 2 All E.R. 175		410
Martinez *v.* Gerber	3 Man. & Gr. 88	*R.*	486
Mason *v.* Clarke	[1954] 1 Q.B. 460; [1954] 1 All E.R. 189	*Rev.*	779
Matthews *v.* Chicory Marketing Board (Victoria)	60 C.L.R. 263		252
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Melbourne Corporation *v.* Barry	31 C.L.R. 174	*R.*	300
Melbourne Corporation *v.* The Commonwealth	74 C.L.R. 31		276
Merest *v.* Harvey	5 Taunt. 442	*R.*	797
Merlihan *v.* A. C. Pope Ld.	[1946] K.B. 166; 61 T.L.R. 508; [1945] 2 All E.R. 449	*R.*	182
Merryweather *v.* Nixan	8 Term Rep. 186	*R.*	560
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Mersey Docks and Harbour Board Trustees *v.* Cameron	11 H.L.C. 443	*R.*	693
Mighell *v.* Sultan of Johore	[1894] 1 Q.B. 149		78
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Miller *v.* Carntyne Steel Castings Co. Ld.	1935 S.C. 20		7
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Miller *v.* William Boothman & Sons Ld.	[1944] K.B. 337; 60 T.L.R. 218; [1944] 1 All E.R. 333	*Appr.*	740, 760, 772, 775, 776
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National Coal Board *v.* England	[1954] A.C. 403; [1954] 1 All E.R. 546		326
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Visser, *In re*, Queen of Holland *v.* Drukker	[1928] Ch. 877; 44 T.L.R. 692	*R.*	523–5, 532, 534
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Wilkes *v.* Bodington	2 Vern. 599	*R.*	229
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1900

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Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch. D, Rules applicable to Cases I and II, r.* 11 (2) (*as substituted by Finance Act*, 1926 (16 *&* 17 *Geo.* 5, *c.* 22), *s.* 32 (1)) - **H.L.(E.) 667**

—— —— *r.* 3 (*a*) - - - **H.L.(E.) 21**

1935

Law Reform (Married Women and Tortfeasors) Act, 1935 (25 *&* 26 *Geo.* 5, *c.* 30), *s.* 6 (1) (*c*) - **H.L.(E.) 169**

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Factories Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 67), *ss.* 12, 13, 14, 16 **H.L.(E.) 321**

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1945

Income Tax Act, 1945 (8 *&* 9 *Geo.* 6, *c.* 32). *s.* 17 (1) - - - **H.L.(E.) 667**

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1947

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Companies Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 38), *ss.* 278, 283, 302 - **H.L.(E.) 491**

1949

Patents Act, 1949 (12, 13 *&* 14 *Geo.* 6, *c.* 87), *s.* 56 (2) - - **H.L.(E.) 534**

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1899–1947

Police Regulation Act, 1899–1947 *of New South Wales* - - - **J.C. 457**

1928

Marriage Act, No. 3726 *of* 1928 (*Victoria*) *ss.* 75, 77 - - - - **J.C. 402**

Workers' Compensation Act, No. 3806 *of* 1928 (*Victoria*) *as amended* (*including amendments by Act No.* 5128 *of* 1946), *ss.* 3 (1), 5 (1) (5) - - **J.C. 1**

1931

State Transport (*Co-ordination*) *Act*, 1931–1951 (*N.S.W.*), *ss.* 12, 14, 17, 18, 19, 22, 37 - - - - - **J.C. 241**

BERMUDA

Criminal Code (*Bermuda*), *s.* 111 - **J.C. 378**

1952

United States Bases (*Agreement*) *Act*, 1952, *s.* 9 (1) - - - - **J.C. 378**

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Order in Council, April 2, 1909, *r.* 2 **J.C. 389**

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British Guiana Rules of Court, 1900, *Ord. XIV, rr.* 13, 14, 15 - - **J.C. 154**

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Matrimonial Rights and Inheritance Ordinance (*Laws of Ceylon*, 1938, *c.* 47), *s.* 35 - - - - - **J.C. 145**

EAST AFRICA (ZANZIBAR)

Sale of Goods Decree (*Laws of Zanzibar*, 1934, *c.* 81), *s.* 3 (1) - - **J.C. 617**

Stamp Decree, 1940 (*No.* 5 *of* 1940) (*Zanzibar*), *ss.* 4, 19, 39; 1st *Sch.*, *arts.* 5 (1) (*a*), 41 - - - - **J.C. 617**

KENYA

Emergency Regulations, 1952 (*Kenya*), *regs.* 8A (1) (*b*), 29 - - - **J.C. 197**

MALAYA

Debtor and Creditor (*Occupation Period*) *Ordinance*, *No.* 42 *of* 1948 (*Federation of Malaya*), *ss.* 4, 8 - **J.C. 230**

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TRINIDAD AND TOBAGO

Port of Spain Corporation Ordinance (*Revised Ordinances of Trinidad and Tobago*, 1950, *c.* 39, *No.* 1), *ss.* 89, 101, 114. **J.C. 389**

UGANDA

Income Tax Ordinance, *No.* 8 *of* 1940 (*Uganda*) (*as amended by s.* 5 *of Ordinance No.* 11 *of* 1943), *s.* 21 (1), *proviso* (*b*), (2) - - - - **J.C. 309**

WEST AFRICA

West African (*Appeal to Privy Council*) *Order in Council*, 1949–50, *art.* 3 (*a*) (*b*) **J.C. 640**

WEST AFRICA (NIGERIA)

Marriage Ordinance, *No.* 14 *of* 1884 (*Lagos*), *s.* 41 - - - - - **J.C. 107**

ERRATUM

[1954] A.C. p. 559, line 3. *For* "must" *read* "need not."

Appeal Cases
BEFORE
THE HOUSE OF LORDS
(ENGLISH—IRISH—AND SCOTTISH)
AND
THE JUDICIAL COMMITTEE
OF
HER MAJESTY'S MOST HONOURABLE
PRIVY COUNCIL

JAMES PATRICK & CO. PROPRIETARY LD. . APPELLANT;

AND

DACIE ETHEL SHARPE . . . . . RESPONDENT.

J. C.*

1954
Oct. 4.

ON APPEAL FROM THE FULL COURT OF THE SUPREME COURT OF VICTORIA.

Australia (Victoria)—Workmen's compensation—Death from disease—While travelling to place of work—Sudden unexpected physiological change—Not associated with any external event or action of deceased—" Injury by accident arising out of or in the course of his employ-" ment "—Auricular fibrillation—Workers' Compensation Act, No. 3806 *of* 1928 (*Victoria*), *as amended* (*including amendments by Act No.* 5128 *of* 1946), *ss.* 3 (1), 5 (1) (5).

Workmen's compensation.

By section 5 of the Workers' Compensation Act, 1928, of the State of Victoria, as subsequently amended and in particular by Act No. 5128 of 1946: " (1) If in any employment personal injury by " accident arising out of or in the course of the employment is " caused to a worker his employer shall . . . be liable to pay com-" pensation . . . (5) . . . an injury by accident to a worker shall

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* *Present*: LORD PORTER, LORD OAKSEY, LORD REID, LORD TUCKER, and LORD ASQUITH OF BISHOPSTONE.

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"be deemed to arise out of or in the course of the employment if "the accident occurs— . . . (b) while the worker—(i) is travelling "between his place of residence and place of employment. . . ."

By section 3 (1): "'Disease' includes any physical or mental "ailment disorder defect or morbid condition whether of sudden or "gradual development and also includes the aggravation accelera-"tion or recurrence of any pre-existing disease as aforesaid.

"'Injury' means any physical or mental injury or disease and "includes the aggravation acceleration or recurrence of any pre-"existing injury or disease as aforesaid."

A workman, while travelling between his place of residence and his place of employment, suffered an auricular fibrillation as a direct result of which he died at his home on the same day. The post mortem disclosed microscopic evidence of degenerative changes in the heart muscle not specific of any disease. No other abnormality was observed. The onset of the auricular fibrillation was a sudden physiological change unexpected and not designed by the worker. The cause of auricular fibrillation appeared not to be known, but it was known to occur with certain types of heart disease. On a claim by the widow of the worker for compensation under the Act in respect of his death:—

Held, (1) that there being no finding that any external event or any action of the deceased played any part in causing the fibrillation to happen when it did, the case must be dealt with on the footing that the fibrillation was due solely to the onset or progress of some disease within the man's body.

(2) That while in all cases in the United Kingdom and in Victoria before 1946 it was necessary, in order to establish that the death was due to injury by accident, to prove that some external event or some action of the deceased had caused the sudden physiological change to happen when it did, the effect of the definitions of "disease" and "injury" incorporated by Act No. 5128 of 1946 was to make it no longer necessary to associate the sudden physiological change with any external event or action by the deceased. The worker had died as the result of injury by accident arising out of or in the course of his employment within the meaning of section 5 (1) of the Act read with the definitions of "disease" and "injury" in section 3 (1), and the widow was accordingly entitled to compensation.

Willis v. *Moulded Products (Australia) Ld.* [1951] V.L.R. 58 approved.

Hetherington v. *Amalgamated Collieries of W. A. Ld.* (1939) 62 C.L.R. 317 considered.

Judgment of the Full Court of the Supreme Court of Victoria [1953] V.L.R. 206 affirmed.

APPEAL (No. 22 of 1953) from a judgment of the Full Court of the Supreme Court of Victoria (October 21, 1952) on a case stated by the Workers' Compensation Board of the State of Victoria (June 12, 1952). The appellant was the employer of the late Sydney Allan Sharpe, and the respondent was his widow.

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The facts found by the Workers' Compensation Board were as follows: "(A) The deceased Sydney Allan Sharpe, late of 39, "St. Vincent Street, Albert Park, shore shipwright aged 51 years "was at all times material a worker within the meaning of the "Workers' Compensation Acts of the State of Victoria and on "December 4, 1950, was in the employ of the [appellant]. "(B) The deceased worker left a widow (the applicant) and one "child under the age of 16 years, both of whom were totally "dependent upon the earnings of the deceased worker. (C) While "travelling between his place of residence and his place of "employment on December 4, 1950, the worker suffered an "auricular fibrillation. (D) As a direct result of such auricular "fibrillation the worker died on December 4, 1950, at his home. "(E) The post mortem disclosed microscopic evidence of "degenerative changes in the heart muscle not specific of any "disease. No other abnormality was observed. (F) The worker "for some years prior to his death suffered from atherosclerosis "and a degenerative and progressive heart disease. (G) The "worker's pathological condition was not known to or suspected "by him. (H) The onset of the auricular fibrillation was a "sudden physiological change unexpected and not designed by "the worker."

The question of law submitted for the opinion of the Full Court was whether upon those findings of fact it was open to the board to find that the deceased died "as the result of injury by "accident arising out of or in the course of his employment" with the appellant. The Full Court (Herring C.J., Lowe and Sholl JJ.) answered that question in the affirmative.

The respondent's claim was made under the Workers' Compensation Act, 1928, of the State of Victoria, as amended from time to time, and particular importance attaches to the amendments made by the Act No. 5128 of 1946. At the relevant date the material statutory provisions were: "Section 5 (1). If in any "employment personal injury by accident arising out of or in the "course of the employment is caused to a worker his employer "shall subject as hereinafter mentioned be liable to pay com"pensation in accordance with the provisions of the Workers' "Compensation Acts. (5) Without limiting the generality of the "provisions of subsection (1) but subject to the provisions of "paragraph (*c*) of subsection (2) of this section, an injury by "accident to a worker shall be deemed to arise out of or in the "course of the employment if the accident occurs—(*a*) while the "worker on any working day on which he has attended at his

" place of employment pursuant to his contract of employment— " (i) is present at his place of employment; or (ii) having been so " present, is temporarily absent therefrom on that day during " any ordinary recess and does not during any such absence volun- " tarily subject himself to any abnormal risk of injury; or " (*b*) while the worker—(i) is travelling between his place of " residence and place of employment; or (ii) is travelling between " his place of residence or place of employment and any trade " technical or other training school which he is required to attend " by the terms of his employment or as an apprentice or which " he is expected by his employer to attend, or is in attendance " at any such school: Provided that any injury incurred while " so travelling is not incurred during or after—any substantial " interruption of or substantial deviation from his journey made " for a reason unconnected with his employment or unconnected " with his attendance at the school, as the case may be; or any " other break in his journey which the board, having regard to all " the circumstances, deems not to have been reasonably " incidental to any such journey."

" Section 3 (1). In this Act unless inconsistent with the " context or subject-matter:—' Disease ' includes any physical or " mental ailment disorder defect or morbid condition whether of " sudden or gradual development and also includes the aggrava- " tion acceleration or recurrence of any pre-existing disease as " aforesaid. . . . ' Injury ' means any physical or mental injury " or disease and includes the aggravation, acceleration or recur- " rence of any pre-existing injury or disease as aforesaid."

1954. June 23, 24, 28, 29; July 1. *Sir Garfield Barwick Q.C.* (Australia), *C. I. Menhennitt* (Australia) and *Peter Oliver* for the appellant. The Supreme Court of Victoria merely followed their own decision in *Willis* v. *Moulded Products (Australia) Ld.*[1] and held that the death by reason of the fibrillation in his heart, which occurred on his way to work, resulted from an injury by accident caused to the worker. The significant phrase is " injury " by accident . . . is caused to a worker." Under the statute the journey to work, among other things, is accounted as being in the course of the employment. It would appear that all the decisions under the English Act can be placed under one of the following three heads: (i) There was nothing accidental about what happened; (ii) the accident did not arise out of the work; and (iii) the court looked at the entire phrase, " injury by accident

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[1] [1951] V.L.R. 58.

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"arising out of and in the course of the employment," and said that the particular facts did not fit that entire phrase.

It is submitted, first, that a physiological condition which is unprovoked by circumstance and entirely autogenous, although sudden, unexpected and not designed by the worker, is not an injury at all in any relevant sense; that is, the process of growing old or becoming diseased, or the disease marching on just by dint of its own progress, does not mean that the workman suffered injury. Secondly, in any event it is not injury by accident. Thirdly, it is not injury by accident caused to the worker. The findings of the Workers' Compensation Board mean, it is submitted, that the fibrillation was a manifestation and natural development of the atherosclerosis and degenerative and progressive heart disease from which he was suffering. Alternatively, if that is not right, there is no evidence as to the cause of the fibrillation. Whichever it be, it is still not an injury within the meaning of the section. It was simply death from natural causes. For a condition to be an injury it must be provoked by some circumstance. A worker is not injured within the meaning of the section if some internal condition reaches a new stage of development simply through a natural progression whether healthy or unhealthy. The importance of this case and of *Willis* v. *Moulded Products (Australia) Ld.*[1] is that it is sought to say that every change to a worker becomes an incapacity; it is here now sought to test that.

The phrase "in the course of" itself involves a sort of causal relationship between the injury and the work; those words are not merely temporal in relation to the employment. One must find the injury so connected as to be said to be in the course of the employment: *Charles R. Davidson & Co.* v. *M'Robb or Officer.*[2] The change from "and" to "or" in section 5 (1) of the Australian Act did not remove the need for a cause of the injury. Mere natural causes of the body are outside it: *Ormond* v. *C. D. Holmes & Co. Ld.*,[3] which was approved in *Fife Coal Co.* v. *Young.*[4] And it was said in *Drylie* v. *Alloa Coal Co. Ld.*[5] that "the doctrine may be stated in a single sentence, and it is this: "the fact of disease is not an accident, but the contraction of "disease may be an accident." The contraction of a disease may in certain circumstances constitute an injury within the section. But an internal physiological condition unprovoked by circumstance is neither the contraction of a disease nor the aggravation or acceleration of it. Aggravation and acceleration in the context of section 5 contemplate some provoking agency which worsens a pre-existing condition. The facts of the present case do not show the contraction or provoked aggravation or acceleration of a disease. It is submitted that the word " injury " was in effect given the meaning for which the appellant contends in *Slazengers (Australia) Pty. Ld.* v. *Burnett.*[6] [Reference was also made to *Hume Steel Ld.* v. *Peart*[7]; *McFarlane* v. *Hutton Brothers*[8]; *Fenton* v. *Thorley & Co. Ld.*[9]; *Clover, Clayton & Co. Ld.* v. *Hughes*[10]; *Kellaway* v. *Broken Hill South Ld.*,[11] and *Hetherington* v. *Amalgamated Collieries of W. A. Ld.*[12]] None of the above cases lend support to the view that an autogenous change is an injury in the relevant sense; they proceeded on the view that it was not an injury. Before the disease becomes an injury it has to be " received " (*Slazengers's* case[13]) or " caused " (the present case), and it must have some circumstance which provokes it. " Caused " is not a weaker word than " received." An injury cannot be caused to a worker if it is unprovoked by any circumstance. An autogenous condition is not caused to the worker in the relevant sense. The fibrillation was not therefore an injury caused to the deceased within the context of section 5.

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[1] [1951] V.L.R. 58.

[2] [1918] A.C. 304, 314; 34 T.L.R. 213.

[3] [1937] 2 All E.R. 795; 53 T.L.R. 779.

[4] [1940] A.C. 479, 486; 56 T.L.R. 508; [1940] 2 All E.R. 85.

[5] 1913 S.C. 549, 561.

Lastly, it was not an injury *by accident* caused to him, and for the purposes of this point all the other elements are conceded against the appellant. The authorities are sufficient to establish the proposition that physiological changes uninduced by circumstances are not injury by accident: *Ormond's* case[14]; *Fenton's* case[15]; *Clover, Clayton's* case[16]; *Barnabas* v. *Bersham Colliery Co.*[17]; *Drylie's* case[18]; *Glasgow Coal Co. Ld.* v. *Welsh*[19]; *Falmouth Docks and Engineering Co.* v. *Treloar*[20]; *Oates* v. *Earl Fitzwilliam's Collieries Co.*[21]; *Miller* v. *Carntyne Steel Castings*

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[6] [1951] A.C. 13.

[7] (1947) 75 C.L.R. 242, 256.

[8] (1926) 136 L.T. 547.

[9] [1903] A.C. 443, 448; 19 T.L.R. 684.

[10] [1910] A.C. 242, 245–7; 26 T.L.R. 359.

[11] (1944) 44 N.S.W., S.R. 210.

[12] (1939) 62 C.L.R. 317.

[13] [1951] A.C. 13.

[14] [1937] 2 All E.R. 795, 800, 806.

[15] [1903] A.C. 443, 455–6.

[16] [1910] A.C. 242, 245–7.

[17] (1910) 103 L.T. 513.

[18] 1913 S.C. 549, 553, 561.

[19] [1916] 2 A.C. 1, 12–3; 32 T.L.R. 359.

[20] [1933] A.C. 481, 484; 49 T.L.R. 250.

[21] [1939] 2 All E.R. 498, 502.

Co. Ld.[22]; *Innes or Grant* v. *G. & G. Kynoch*[23]; *Maxwell* v. *Ruabon Coal and Coke Co. Ld.*,[24] and *Roberts* v. *Dorothea Slate Quarries Co. Ld.*[25] The above authorities support the argument that however regarded—whether one takes the fibrillation as a step in the disease, or the fibrillation itself—it was not injury by accident.

R. M. Eggleston Q.C. (Australia) and *Harold Brown* for the respondent. The policy of this legislation really reflects an attempt to get some kind of objective standard which would be capable of proof by the worker with the minimum of difficulty in cases where previously the worker might succeed or fail according to some quite irrelevant circumstance. Here for the first time in the Act of 1946 the legislature sought to extend protection beyond those circumstances which had always been within the protection. This matter has to be judged on the facts; the appellant has not a finding that the fibrillation was a step in the course of the disease, nor a finding that it was an inevitable step—the usual progress.

Decisions before 1946 justify the conclusion that what happened here was injury by accident caused to the worker and, if that is so, it would then follow that, since the accident arose during the protected period, all the conditions are satisfied. And it is submitted that since 1946, whatever may have been the choice by the tribunal as between the various expositions of the expression "injury by accident," if there was a difference between them, the form of the legislation indicates clearly that the legislature acted on the view that injury by accident could only have the meaning which the respondent seeks to attach to it by reference to those cases. Whichever view of the law before 1946 was correct, the legislature plainly intended to exclude the argument now put for the appellant—that injury as applied to disease could only bring disease in if there was some inducing cause. The 1946 Act said specifically that disease is injury of itself, and irrespective of any inducing cause; and not only disease, for it is provided that each fresh disorder or morbid condition, and each acceleration or aggravation, is itself to be treated as injury; so there is to be no fuss hereafter about when the man started to suffer from the disease which is injury.

In cases falling within section 5 (5) of the Act, no causal connexion between the injury and the journey is required: *Willis* v. *Moulded Products (Australia) Ld.*[26] "Injury by accident" means no more than injury not expected by the worker and not designed by him: *Fenton* v. *Thorley & Co. Ld.*[27]; *Clover, Clayton & Co. Ld.* v. *Hughes*[28]; *Hetherington* v. *Amalgamated Collieries of W. A. Ld.*[29] The argument for the appellant that the phrases "injury by accident" and "is caused to the worker" import some contributory cause external to the worker is unsound and contrary to the current of authority. In fact "disease" is used in the definition as describing not an activity—a contraction—but a condition. The introduction of the word contraction, as suggested for the appellant, is not only unwarranted, but brings in an element foreign to the expression "recurrence." In this case there is an express finding of a sudden physiological change, and if the submission for the respondent, that "injury by accident" would before 1946 have covered this event, is right—that the onset of the fibrillation was injury by accident within the meaning of dicta in the cases—the definition of "disease" need not be relied on. On the other hand, if the appellant is right in saying that disease was not injury before 1946, the legislature has now said that disease is injury. In the present case it is the happening of the fibrillation which is the injury; but the definition says that injury does include *any* disease, not just those diseases which were spoken of before 1946.

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[22] 1935 S.C. 20.

[23] [1919] A.C. 765, 798; 35 T.L.R. 392.

[24] (1916) 86 L.J.K.B. 428, 430.

[25] [1948] W.N. 246; [1948] 2 All E.R. 201, 205.

For the appellant it was said that this fibrillation was the natural progression of the disease. The expression "natural progression" is itself one which contains elements of confusion and uncertainty. There is no finding that the fibrillation was due in any sense to his pre-existing heart disease; so there was an event happening which caused the death. The Board is urged not to give a decision which may involve a reference back for further facts. It is only when it is said that nothing new happened on that day—that there was not an event then—that the question whether there was progression or not has any relevant meaning.

The passages in *Kellaway's* case[30] to which counsel for the appellant referred are out of line with the English cases. In *Slazengers's* case[31] the Board were compelled to the decision that the statutory definition of disease applied, and having come to that conclusion all argument whether injury could include disease or any particular kind of disease became irrelevant. In *Hume Steel Ld.* v. *Peart*[32] it was said that an autogenous disease could be injury by accident. *Barnabas* v. *Bersham Colliery Co.*[33] affords an illustration of the sense in which the court understood the word "accident." In *Maxwell's* case[34] the majority of the Court of Appeal defined the question as being whether the accident arose out of the employment. In *Trim Joint District School Board of Management* v. *Kelly*[35] a subjective test was applied in construing "accident," and it was satisfied. The cases show that the House of Lords by 1914 said that no significance could be attributed to the word "accident" except suddenness, unexpectedness and lack of design on the part of the workman. Those are subjective questions: *Innes or Grant* v. *G. & G. Kynoch.*[36] If all that happens is that a man goes to work while he has a disease, but no event occurs, then it is conceded that he cannot recover, because there would not be an accident which occurred at the relevant time.

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[26] [1951] V.L.R. 58.
[27] [1903] A.C. 443.
[28] [1910] A.C. 242.
[29] 62 C.L.R. 317.
[30] 44 N.S.W., S.R. 210.
[31] [1951] A.C. 13, 20.

If one had to choose in this legislation between the meaning of accident which was given by Romer L.J. in *Ormond's* case[37] and the meaning which was given in the judgments in the House of Lords in *Clover, Clayton & Co. Ld.* v. *Hughes*[38] and such cases, one would have to bear in mind that disease has been stated to be injury, and one would choose having regard to having a practical scheme of legislation. The cases since *Fenton* v. *Thorley & Co. Ld.*[39] represent continuous attempts by employers to resist the implication of that case. The *Falmouth Docks* case[40] was one in which no one knew from what the workman really died, but it was held, affirming the decision of the Court of Appeal, that on the evidence the work contributed to his death. It is a case in which there was no evidence of any event in the work; it stands as one in which on the medical evidence the work contributed. In the present case all that is wanted is an event which is not one of an infinite series; some new fact; it is sufficient for the respondent's purposes if it was a sudden and unexpected physiological change—it is an event recognizable as something which has not happened before or is not accustomed to happen to the respondent. In *Partridge Jones and John Paton Ld.* v.

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[32] 75 C.L.R. 242.

[33] (1910) 102 L.T. 621.

[34] 86 L.J.K.B. 428.

[35] [1914] A.C. 667, 675–722; 30 T.L.R. 452.

[36] [1919] A.C. 765, 792.

[37] [1937] 2 All E.R. 795.

[38] [1910] A.C. 242.

[39] [1903] A.C. 443.

[40] [1933] A.C. 481.

James[41] the question whether in substance the accident came from the disease alone was laid down as a test. In *Ormond's* case[42] Romer L.J. said that there cannot be accident unless there is found some specific thing that the man did, but *Partridge Jones's* case[43] says that one does not have to find that. In *Miller* v. *Carntyne Steel Castings Co. Ld.*[44] the disease gradually and imperceptibly got worse; it was not due to any event. [*McFarlane* v. *Hutton Brothers (Stevedores) Ld.*[45] was also referred to.] *Drylie* v. *Alloa Coal Co. Ld.*,[46] on which the appellant relied, in so far as it did lend support to the idea that some event occurring in the course of the disease cannot be an accident, is inconsistent with later cases. In *Hetherington's* case[47] it was said that if a man died as a result of a heart attack while at his work he was entitled to recover, and that is good enough for the respondent here. [Reference was also made to *Fife Coal Co.* v. *William Young*[48]; *Oates* v. *Earl Fitzwilliam's Collieries Co.*[49]; *Moore* v. *Tredegar Iron and Coal Co. Ld.*,[50] and *Roberts* v. *Dorothea Slate Quarries Co. Ld.*[51]] There is nowhere in any of the cases any warrant, except one statement, for the suggestion that some cause is necessary to convert an event unexpected, undesigned and sudden, into an accident. The current of authority is really all one way.

On the facts found the fibrillation constituted "injury by "accident" within the meaning of that phrase in the decided cases; and on those facts the fibrillation was also an "injury by "accident" within the proper meaning of that phrase construed in the light of the definitions in the Act. The Supreme Court came to a correct conclusion, and *Willis* v. *Moulded Products (Australia) Ld.*[52] was also correctly decided.

Sir Garfield Barwick Q.C. in reply. It is a question of construction of this statute, and whether this mere change, albeit suddenly manifested, is an injury by accident. No English authority lends comfort to the proposition that a mere physiological change due entirely to the progression of the man himself is an injury by accident. In *Ormond's* case[53] Romer L.J. said that the mere march of the disease was not injury by accident. It was said for the respondent here that the mere marching of the disease was an event, and that that was the event from which the incapacity resulted: it was said that the unexpected element of the accident came from *Fenton* v. *Thorley & Co. Ld.*[54] But it is clear that no exhaustive definition of the element of accident was there attempted. It is not sound to take words out of their context and apart from the argument and facts to which they were addressed. A physiological change in the march of a disease cannot in the proper use of the language be called an injury; there must be something more than the progress of the disease or its development in the body. [Reference was made to the *Fife Coal Co.* case[55]; *McFarlane's* case[56]; *Fenton's* case[57]; *Clover, Clayton's* case[58]; the *Trim School Board* case,[59] and *Millar* v. *Coltness Iron Co.*[60]] The decision in the last cited case is really a fortiori, because there the man was working, and here he was doing nothing. The *Falmouth Docks* case[61] was also a case in which what happened was brought on by something done at the time. All that the cases show is that the ordinary work could supply the particular event. [Reference was also made to *Walker* v. *Bairds & Dalmellington Ld.*[62]; *Walkinshaw* v. *Lochgelly Iron and Coal Co. Ld.*,[63] and *Eke* v. *Hart-Dyke.*[64]]

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[41] [1933] A.C. 501; 49 T.L.R. 233.
[42] [1937] 2 All E.R. 795.
[43] [1933] A.C. 501.
[44] 1935 S.C. 20.
[45] 136 L.T. 547.
[46] 1913 S.C. 549.
[47] 62 C.L.R. 317.
[48] [1940] A.C. 479.
[49] [1939] 2 All E.R. 498.
[50] (1938) 31 B.W.C.C. 359, 371.
[51] [1948] 2 All E.R. 201, 205.
[52] [1951] V.L.R. 58.
[53] [1937] 2 All E.R. 795.

It was said for the respondent that every step in the development of the disease was itself an injury by accident within the definition: he gives no significance to the words "aggravation or "acceleration," for if every step in a disease is itself a disorder within the definition, then there is no need to trouble about aggravation or acceleration. The submission for the appellant is that the retention of the words "by accident" in the section and the retention of the form itself, even in the disjunctive form, has this bearing on the definitions, that they should be regarded as merely codifying what was then the law. The submission is that if the development of the disease, in its initial appearance or its progress, was solely due to the progression of the man's own body, then neither its initial manifestation nor its successive stages can be said to be accidental. It cannot be accidental if it is inevitable.

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[54] [1903] A.C. 443.
[55] [1940] A.C. 479, 486.
[56] 20 B.W.C.C. 222, 232.
[57] [1903] A.C. 443, 446.
[58] [1910] A.C. 242, 246.
[59] [1914] A.C. 667, 720.
[60] 1929 S.C. 429, 437.
[61] [1933] A.C. 481, 484.
[62] 1935 S.C.(H.L.) 28.
[63] 1935 S.C.(H.L.) 36.
[64] [1910] 2 K.B. 677, 681; 26 T.L.R. 613.

Oct. 4. The judgment of their Lordships was delivered by Lord Reid, who stated the facts and statutory provisions set out above, and continued: The nature and cause of auricular fibrillation do not appear from the findings of the board. It appears to have been agreed between the parties that the Full Court should inform themselves on this matter by consulting medical works, and a number of passages from such works are set out by Sholl J. in his judgment. This is the only material now available to their Lordships, and from this material it appears that by auricular fibrillation is meant a condition in which the auricles of the heart cease to contract rhythmically as a whole in a series of orderly beats but the muscles contract in an inco-ordinated manner so that the blood circulation is impaired, the beat of the heart becoming irregular. The cause of this condition does not appear to be known but it is known to occur with certain types of heart disease. The board in its findings stated that the post mortem disclosed evidence of degenerative changes in the heart muscle not specific of any disease but that the deceased had for some years suffered from atherosclerosis and a degenerative and progressive heart disease. It is not at all clear from these findings whether the board meant to find that the auricular fibrillation was a further stage in a progressive disease which had already become established or that the auricular fibrillation was a new disorder not related to the disease which had already become established. But it is not necessary, in their Lordships' view, to pursue this question because their Lordships would reach the same conclusion on either interpretation of the board's findings. Their Lordships agree with Sholl J. that it must be held that the deceased died as the result of a sudden and unexpected onset of a functional failure of the heart muscle resulting in a functional failure of the vital organs and that the deceased simply died because his heart suddenly ceased to function properly.

The question for decision in this case, therefore, is whether by the occurrence of this auricular fibrillation personal injury by accident was caused to the deceased within the meaning of section 5 (1) of the Act reading into that section the definitions of " disease " and " injury " contained in section 3. If it was, then the requirements of section 7 are satisfied because the case stated contains a finding that as a direct result of the auricular fibrillation the deceased died on the same day at his home, and the requirement of section 5 that the injury by accident must arise out of or in the course of the employment is satisfied because section 5 (5) deems the injury by accident to have arisen out of or in the course of the employment if the accident occurs while the worker is travelling between his place of residence and place of employment.

Before the passing of the Act No. 5128 the law in Victoria on questions material to this case was the same as it was in the United Kingdom under the Workmen's Compensation Acts. The injury by accident had " to arise out of and in the course of the " employment," there was no statutory definition of injury corresponding to the definition in section 3, and there was nothing corresponding to section 5 (5). There is no dispute in this case about the applicability of section 5 (5). This case turns on the extent of the changes made by the enactment of the definitions of " injury " and " disease " and by the substitution of " or " for " and " in the phrase " arising out of or in the course of the " employment."

To determine the meaning and effect of these amendments it is necessary to have in mind the state of the law before they were enacted. There was little controversy about this except on one point, and their Lordships will not make any extensive examination of the authorities. The relevant words in the statutes were " personal injury by accident arising out of and in the course of " the employment." With regard to these words Lord Macnaghten said in the early case of *Fenton* v. *Thorley & Co. Ld.*[1]: " Now the expression ' injury by accident ' seems to me to be a " compound expression. The words ' by accident ' are, I think, " introduced parenthetically as it were to qualify the word " ' injury,' confining it to a certain class of injuries, and excluding " other classes, as, for instance, injuries by disease or injuries " self-inflicted by design. Then comes the question, do the words " ' arising out of and in the course of the employment ' qualify " the word ' accident,' or the word ' injury,' or the compound " expression ' injury by accident ' ? I rather think the latter view " is the correct one." That view has been accepted, but " the " phrase ' injury by accident ' as used in successive Workmen's " Compensation Acts has been the subject of repeated and " elaborate discussion, and in the course of the forty years or more " which have passed since the first decisions under the Act of 1897 " it is possible, as Lord Tomlin pointed out in a case which I shall " mention, to trace a gradual but steady extension of its

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[1] [1903] A.C. 443, 448; 19 T.L.R. 684.

"meaning" (*per* Viscount Caldecote L.C. in *Fife Coal Co.* v. *Young* [2]).

This extension is particularly notable in cases dealing with disease. In *Walker* v. *Bairds & Dalmellington Ld.*[3] Lord Tomlin, in reviewing the authorities, said with regard to *Clover, Clayton & Co.* v. *Hughes* [4]: "This case seems to me to establish "that there may be personal injury by accident, even though the "employee's work has proceeded in the normal way, and even "though the injury is due to the presence of a special "condition in the employee's body." Later in the same speech he said [5]: "The latest stage in the progression was reached in "the cases of *Falmouth Docks & Engineering Co.* v. *Treloar* [6] "and *Partridge Jones & John Paton Ld.* v. *James.*[7] In each of "these cases a man with heart disease died at his work which he "was or had been doing in the ordinary way, this work being "found to have contributed to his death. There was in neither "case any distinct event or occurrence which, taken by itself, "could be recognized as an accident. Each case was held to be "within the Act." But death or disability which was merely the result of a continuous process over a period, there being no particular change in the man's condition at any one time, was never held to be due to injury by accident. This was finally decided in *Roberts* v. *Dorothea Slate Quarries Co. Ld.*[8] In view of one argument submitted for the appellant in the present case their Lordships will quote a passage from the speech of Viscount Caldecote L.C. in *Fife Coal Co.* v. *Young*, already referred to,[9] where, having approved of earlier cases on this point, he said [10]: "In all of them "the facts were such as to make it impossible to identify any "event which could, however loosely, be called an accident. In "these cases the workmen failed, not because a disease was "outside the purview of the Workmen's Compensation Act altogether, but because the burden of proof that there had been an "accident was not discharged. When the workman's claim is in "respect of a progressive disease the difficulty of pointing to a "definite physiological change which took place on a particular "day is, in general, likely to be almost insuperable, and in 1906 "Parliament, in the case of certain diseases and later by an "enlargement of the schedule of industrial diseases, relieved the

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[2] [1940] A.C. 479, 483; 56 T.L.R. 508; [1940] 2 All E.R. 85.

[3] 1935 S.C.(H.L.) 28, 32.

[4] [1910] A.C. 242; 26 T.L.R. 359.

[5] 1935 S.C.(H.L.) 28, 33.

[6] [1933] A.C. 481; 49 T.L.R. 250.

[7] [1933] A.C. 501; 49 T.L.R. 233.

[8] [1948] 2 All E.R. 201.

[9] [1940] A.C. 479.

[10] Ibid. 484.

" workman in the specified cases of this obligation. But if the " circumstances of any claim in respect of incapacity due to " disease are such as to make it possible to discharge this burden, " I see no reason for thinking that what is called a disease is " different in principle from a ruptured aneurism as in *Clover,* " *Clayton & Co. Ld.* v. *Hughes* [11] or heart failure as in *Falmouth* " *Docks & Engineering Co. Ld.* v. *Treloar.*[12] "

In all cases in the United Kingdom and in Victoria before 1946 it was necessary to prove that some external event or some action of the deceased had caused the sudden physiological change to happen when it did. In the present case the worker's death was due to a sudden physiological change which happened at a time deemed to be in the course of his employment, but there is no finding that any external event or any action of the deceased played any part in causing the fibrillation to happen when it did and their Lordships must deal with the case on the footing that the fibrillation was due solely to the onset or progress of some disease within the man's body.

The question now to be decided is whether the effect of the amendments made by the Act No. 5128 is to make it no longer necessary to associate the sudden physiological change with any external event or any action by the deceased. That question depends on the reason why such an association had formerly to be proved. Undoubtedly one reason was that, as the injury by accident had always to arise out of the employment, a causal connexion between the injury and the employment had to be proved and that could only be done by associating the injury with something which the man did or something which befell him in connexion with the employment. If that was the only reason then it is no longer necessary to establish that association in cases where the injury occurred or is deemed to have occurred in the course of the employment because in those cases it is no longer necessary to prove that the injury arose out of the employment. But it is maintained for the appellant that that was not the only reason: it was argued that the authorities show that " injury by " accident " means injury brought about by something external and excludes any injury due solely to the onset or development of disease. The statute still requires injury by accident if the employer is to be liable under section 5, and if that phrase has that meaning then the appellant would not be liable in this case.

It is not easy to determine from the authorities whether any

[11] [1910] A.C. 242.

[12] [1933] A.C. 481.

precise meaning had become attached to the words "injury by "accident" taken by themselves because it was never necessary to consider those words in isolation from the whole phrase "injury by accident arising out of and in the course of the "employment." In a number of passages cited by counsel for the appellant the words "injury" or "accident" or "injury by "accident" may appear to be interpreted in the sense for which the appellant contends, but in at least most of those passages it appears to their Lordships that there was no intention to consider these words in isolation and that what was really being considered was the meaning of the whole phrase.

The word "injury" has now been defined by the Act No. 5128 and effect must be given to this definition on its true interpretation. The obvious purpose of this Act was to extend the scope of statutory compensation, and it may well be that the enactment of this definition has altered or widened the meaning of the phrase "injury by accident." By definition the word injury now means, inter alia, any disease, and disease includes, inter alia, any physical ailment, disorder, defect or morbid condition whether of sudden or gradual development, and also includes the aggravation, acceleration or recurrence of any pre-existing disease.

If the words of these definitions are given their natural meanings then undoubtedly the deceased suffered injury at a time deemed to be in the course of his employment. But it was argued for the appellant that a narrower meaning must be given to those words, and in particular that "disease" in the definition of injury means the contraction of disease from some external cause and that "aggravation, acceleration or recurrence" of a disease means aggravation, acceleration or recurrence brought about by some external event: if the first onset of a disease or its subsequent aggravation, acceleration or recurrence is due solely to conditions within the man's body then it was argued that that is not covered by the definition. This argument appeared to their Lordships to be based on three main grounds. In the first place it was said that otherwise there is a conflict with section 8 (1) of the Act No. 5128 (now section 12 of the Workers' Compensation Act, 1951, and hereafter referred to as section 12). Then it was said that the definitions ought if possible to be read as not altering the existing law. And finally it was said that to give to the definitions their full natural meaning would so extend the scope of the Act as to make it apply to cases which could not have been intended to involve liability to pay compensation. Even if there were force in these reasons their Lordships would have great difficulty in holding it possible to construe these definitions in this way. But in their Lordships' judgment there is little or no substance in these reasons.

Section 12 (1) (*b*) provides: "Where the death of a worker is "caused by any disease and the disease is due to the nature of "any employment in which the worker was employed at any time "prior to the date of disablement, then subject to the provisions "hereinafter contained the worker or his dependants shall be "entitled to compensation under this Act as if the disease were "a personal injury by accident arising out of or in the course of "that employment and the disablement shall be treated as the "happening of the accident." It is said that the latter part of this subsection shows that a disease by itself is not a personal injury by accident and that a disablement by such a disease is not an accident. But this argument leaves out of account the fact that the statute requires not merely injury but injury by accident.

The words "by accident" are not defined in the statute and must therefore be interpreted in light of the authorities. Their Lordships have already noted that a disease of gradual development, even though brought on by the man's work, cannot be held to be injury by accident, and on any view the provisions of section 12 (1) (*b*) were necessary to deal with disablement which did not happen suddenly. It is true that if the natural meaning is given to the definition of injury sections 5 and 12 will overlap, and cases of sudden disablement may be covered by both provisions. But that is no sufficient reason for giving a limited meaning to the definition of injury.

Then it was said that the definitions ought so far as possible to be read as setting out the existing law and not as extending it. But the Act by which they were enacted was an Act designed to extend the scope of compensation and there is no reason why such an extension should not be made in this way. Finally, it was said that so wide an extension cannot have been intended because it might involve liability to pay compensation for disablement caused by some gradual failure of strength due solely to advancing age. But it does not appear to their Lordships that the words of the definition of disease can easily bear that interpretation. Disease is defined as including any ailment, disorder, defect or morbid condition, but all these words must be read in their context and the context does not suggest that interpretation to their Lordships. But it is not necessary to decide that question because in Victoria there must not only be injury but injury by accident, and that limitation is sufficient to exclude the class of case on which this argument was based.

Their Lordships must now deal with certain Australian cases relied on by the appellant. *Slazengers (Australia) Pty. Ld.* v. *Burnett*[13] was an appeal from the Supreme Court of New South Wales. The Workers' Compensation Act in that State differs materially from the Act in Victoria. The injury need not be by accident, but injury is more narrowly defined: in particular the definition only includes a disease to which the employment was a contributory factor. The decision of their Lordships turned on the applicability of that definition in a certain subsection, and the grounds of decision have no application in the present case. It is true that the question whether a disease not induced by an outside event could be an injury was raised in argument, but it was not dealt with by their Lordships. The appellant founded on the reference in the judgment to *Kellaway* v. *Broken Hill South Ld.*,[14] but that reference[15] is somewhat cryptic: "A worker who, "having reached his place of employment, dies of a coronary "occlusion, being the result of a disease to which the employment "was not a contributing factor, is not entitled to compensation: "see *Kellaway* v. *Broken Hill South Ld.*,[14] a case clearly decided "correctly, though some of the reasoning may be open to "criticism." The reasoning of Jordan C.J. was different from that of Roper J., and Roper J. expressed the opinion that an autogenous disease was not an injury. It was argued that it could be inferred that it was the reasoning of the Chief Justice which was doubted and that therefore the opinion of Roper J. must have been approved. Their Lordships are doubtful whether that is the correct inference, and in any event Roper J. was dealing with a definition of injury which differed materially from that in force in Victoria.

Then the appellant founded on *Hetherington* v. *Amalgamated Collieries of W. A. Ld.*,[16] a case from Western Australia, where, as in Victoria, it is necessary to prove injury by accident, but the injury need only arise out of or in the course of the employment. In that case it was found that the man's exertion at his work had contributed to his death and so there was an external event and the point at issue in the present case was neither decided nor specifically considered. But the judges of the High Court made an elaborate examination of the authorities, and it was pointed out for the appellant that if they had thought that an external event was unnecessary and that a sudden physiological change by itself could be an injury by accident it would have been much easier to decide the case on this ground. That may be true, but their Lordships cannot infer from it that any of the judges had formed a definite opinion that a sudden physiological change by itself could not be injury by accident. Evatt J. pointed out[17] that the appeal could be disposed of merely by reference to the accepted principles laid down in the English cases, and that where it was necessary the introduction of the disjunctive form of expression would require further consideration, but in that case this was not necessary. In that case there was nothing accidental about the event which led to the man's death occurring when it did. His disease was such that ordinary exertion at his work led to his death. The only thing which could be said to be accidental or unexpected was his sudden death at that particular time. On that matter Dixon J. (as he then was) said[18]: "Surprising as it "may seem, such a cause of death falls within the definition of "injury by accident arising out of the employment. As a matter "of common speech, the expression 'injury by accident' appears "inappropriate and inapplicable. But a long course of judicial "decisions has extracted from the expression latent implications "which make the test of the employer's liability independent of "such things as external mishap, traumatic injury and unusual or "unexpected incidents of work or duty."

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[13] [1951] A.C. 13.

[14] (1944) 44 N.S.W., S.R. 210.

[15] [1951] A.C. 13, 21.

[16] (1939) 62 C.L.R. 317.

The appellant accepted that passage as stating the law accurately. It was admitted that in Victoria it is now unnecessary to have an external event of an accidental or unexpected character or an event connected with the man's work or, in a case to which section 5 (5) applies, connected with his journey. But it was argued that it is still necessary to have an external event of some kind without which the physical breakdown would not have occurred when it did. It was admitted that the event need only have been the last straw and, indeed, counsel for the appellant ultimately admitted that it may not be necessary always to prove just what the event was. If a man has died and there is no direct evidence of what happened just before the physical breakdown it was admitted that it would be enough if the Workers' Compensation Board were satisfied by medical evidence that in all probability the breakdown would not have occurred at that particular time unless something external had happened to cause

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[17] 62 C.L.R. 317, 337.

[18] Ibid. 332.

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it to occur then. That being so, it is very difficult to suppose that it could have been intended to retain the need to prove some external event in every case, and their Lordships would only be prepared to accept the appellant's contentions if the words used by the legislature compelled that conclusion. But far from compelling that conclusion, in their Lordships' judgment the terms of the statute point almost irresistibly to the opposite conclusion.

The first case in which it was necessary to decide the present question was *Willis* v. *Moulded Products (Australia) Ld.*[19] In that case the worker died as a result of cerebral haemorrhage which occurred while he was travelling to his work. His physical condition was such that the strain of his normal living or activity of any kind was likely to cause such a haemorrhage, but its occurrence at the time when it did occur was unexpected. It was argued that there could be no injury by accident unless there was shown to be some agency or some circumstance extraneous to the worker which brought about the injury, but the Full Court held that the employer was liable to pay compensation. That case is indistinguishable from the present case, and the present case was brought before the Full Court with the object of having the decision in *Willis'* case [19] reconsidered. But the court decided to follow the decision in *Willis'* case.[19] In both *Willis'* case [19] and the present case the authorities were fully reviewed, particularly by Sholl J., and their Lordships agree with the decisions. Their Lordships will therefore humbly advise Her Majesty that this appeal should be dismissed. The appellant must pay the costs of the appeal.

Solicitors: *Nicholas Williams & Co. for Middleton, McEacharn & Shaw, Melbourne; Waterhouse & Co. for Maurice Blackburn & Co., Melbourne.*

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[19] [1951] V.L.R. 58.

MORGAN (INSPECTOR OF TAXES) . . . . APPELLANT; H. L. (E.).*

AND

TATE & LYLE LD. . . . . . . RESPONDENTS.

1954
Apr. 5, 6, 7, 8, 9;
June 1.

Revenue — Income tax — Expenses — Company — Advertising to prevent nationalization of industry—" Trade "—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch. D, Cases I and II, r.* 3 (*a*).

A company engaged in sugar refining incurred expenses in a propaganda campaign to oppose the threatened nationalization of the industry. The Commissioners for the General Purposes of the Income Tax Acts found that " the sum in question was money " wholly and exclusively laid out for the purposes of the company's " trade and was an admissible deduction from its profits for income " tax purposes " :—

Held (*per* Lord Morton of Henryton, Lord Reid and Lord Asquith of Bishopstone; Lord Tucker and Lord Keith of Avonholm dissenting) that the object of the expenditure being to preserve the assets of the company from seizure and so to enable it to carry on and earn profits, there was no reason in law to prevent the Commissioners from so finding. On the evidence it was not to be assumed that the trade of the company would have continued, in an income tax sense, in other hands, after nationalization and accordingly that the expenditure was incurred merely for the purpose of preventing a change of ownership.

Inland Revenue Commissioners v. *Barr* [1954] 1 W.L.R. 792; [1954] 2 All E.R. 218 distinguished.

Principles in *Usher's Wiltshire Brewery Ld.* v. *Bruce* [1915] A.C. 433; 31 T.L.R. 104 and *British Insulated and Helsby Cables Ld.* v. *Atherton* [1926] A.C. 205; 42 T.L.R. 187 applied.

Strong & Co. of Romsey Ld. v. *Woodifield* [1906] A.C. 448; 22 T.L.R. 754 considered.

Ward & Co. Ld. v. *Commissioner of Taxes* [1923] A.C. 145; 39 T.L.R. 90 distinguished.

Decision of the Court of Appeal [1953] Ch. 601; [1953] 2 All E.R. 162 affirmed.

APPEAL from the Court of Appeal (Jenkins and Hodson L.JJ., Singleton L.J. dissenting).

This was an appeal from an order of the Court of Appeal dated May 5, 1953, dismissing an appeal by the appellant, David Morgan (Inspector of Taxes), from an order of the Chancery Division of the High Court of Justice (Harman J.) dated December 18, 1952, whereby an appeal by the appellant on a case stated by the Commissioners for the General Purposes of the Income Tax Acts for the City of London was dismissed, and the determination of the commissioners affirmed. The appeal related to the computation for the purposes of income tax of the profits of the trade of the respondent company, Tate & Lyle Ld., which was that of sugar refining.

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* *Present*: LORD MORTON OF HENRYTON, LORD REID, LORD TUCKER, LORD ASQUITH OF BISHOPSTONE, and LORD KEITH OF AVONHOLM.

The company claimed that a sum expended by it in carrying out a "campaign" against the nationalization of the sugar refining industry was deductible in computing its profits for the purposes of income tax for the year ended April 5, 1951. The amount claimed was £15,339 15s. 2d., but it was intended that the precise amount should be agreed between the parties in the event of the House of Lords upholding the claim in principle.

The following paragraphs are taken from the case stated:

"(4) During the years immediately following the political "changes in 1945, the directors of the company were becoming "increasingly concerned by reason of statements, written and "verbal, made by supporters of the Labour Government advo-"cating nationalization of the sugar industry. . . .

"(5) Notwithstanding the indications above referred to, the "company decided to take no immediate action, but early in "1949 it became evident to the board of directors from reports "and articles appearing in the press that the Labour Party "Executive was now discussing the question of including in the "Labour Party's draft General Election programme a project for "nationalizing the sugar industry." (The statements in the press were set out.)

"(6) In April, 1949, the Labour Party Executive's statement "of policy for discussion at the party conference at Blackpool "was issued. . . . The following passage appeared on p. 17 of "the publication: 'Sugar refining is also controlled by a State-"'protected private monopoly which has enabled large profits to "'be made for private shareholders. One concern dominates "'the British sugar industry; it also has large interests in some "'of the colonial territories which the Labour Government is "'pledged to develop. The sugar industry is vital both in war "'and peace. Labour intends to transfer to public ownership "'all the sugar manufacturing and refining concerns.' On a "perusal of this publication, the board of directors entertained "no doubt that the nationalization of the sugar refining industry "would become part of the Labour Party's considered official "programme and furthermore that the company was the 'one

" 'concern' therein referred to. They accordingly decided to " take every legitimate step to oppose this. . . ."

(Paragraph (7) referred to an unsuccessful attempt to persuade the Labour Party Policy Committee to receive a deputation from the British Sugar Refiners' Association.)

" (8) Efforts to obtain consent to the said deputation having " failed, the directors were more than ever convinced that " nationalization of the industry was intended and that the company would thereby lose its business and assets. Accordingly " at an extraordinary meeting of the stockholders of the company " which was held on September 15, 1949, the following resolution " was proposed and passed: 'Believing as we do that nothing " 'but harm to workers, consumers and stockholders alike can " 'spring from the nationalization of the sugar refining industry, " 'the members of the company hereby empower the board of " 'directors to do everything in their power to meet the threats " 'of the nationalizers who, learning nothing from the chaos, " 'losses and labour unrest that they have created in other industries, now wish to seize the assets of the company.' . . ." (There followed a reference to the speeches of Lord Lyle of Westbourne, the president of the board of directors, at a meeting, a report of which was annexed to the case.)

" (10) In fulfilment of the obligation imposed upon them by " the resolution referred to in paragraph (8) hereof, the directors " decided to intensify their anti-nationalization propaganda campaign which was of national dimensions and which was in the " hands of Aims and Industries Ld. in order to try to preserve " the business and assets of the company intact."

" (12) During the company's accounting year to October 1, " 1949 (the basis of the assessment under appeal) Aims and " Industries Ld. expended £29,398 5s. 0d. . . ." (Paragraph (13) referred to the suggested allocation of this expenditure, viz., general advertising £11,508 4s. 10d.; specific anti-nationalization £15,339 15s. 2d.; general expenses £2,550 5s. 0d.)

" (15) The following witnesses, whose evidence was accepted, " were called on behalf of the company: Lord Lyle of West-" bourne, president of the board of directors of the company, " gave evidence to the following effect . . . The directors thought " that if nationalization occurred the State would take over the " company's assets and its business, and they decided that they " would take such legal steps as they could to try and prevent " this. The primary object of the propaganda campaign was to " prevent the company from losing its business and to preserve its "assets intact. He agreed that if the company lost its business "the stockholders would also suffer and he also agreed that the "preservation of the company's business would, incidentally, "save the stockholders from injury as well. He had never "thought of the alternative method of nationalization by which "the State would have acquired all the capital stock of the "company from its members. The directors' intention was to "protect the company—in so doing they protected the stockholders also; it would be their duty to protect them. Mr. "William Robert Booth, director of the company [elected after "March 11, 1950] and secretary since 1945, gave evidence to "the following effect . . . It did occur to him that one way of "nationalizing the company would be for the State to acquire "all the capital stock, but they had no right to assume which "form nationalization would take. There was a danger that it "would take various forms but they could only assume the worst "and do their best to protect their own business. They were "anxious to prevent nationalization from taking place in any "form. Mr. John Arthur Nicholson, a chartered accountant, ". . . produced the auditors' report and accounts. He stated "that in accordance with ordinary commercial accountancy "practice the said £29,398 must be charged against the profit "to which it related. Any item of expenditure which did not "produce a capital asset had to be so charged."

"(18) . . . The Commissioners found that the sum in question "was money wholly and exclusively laid out for the purposes of "the company's trade and was an admissible deduction from its "profits for income tax purposes. . . ."

It appeared from documents annexed to the case that part of the money in question was spent before September 15, 1949.

Sir Reginald Manningham-Buller Q.C., S.-G., and *Sir Reginald Hills* for the Crown. The following propositions are submitted:

(1) In finding the balance of profits or gains capital expenditure cannot be deducted, but it is not only capital expenditure which cannot be deducted. There may be expenditure made out of profits after they are earned. To be deductible the expenditure must be necessary to the earning of the receipts in the year in question or the following year. In ascertaining the balance of profits or gains one can only deduct a proper debit item.

(2) As to the meaning of the words "for the purposes of the "trade" in rule 3 (*a*) of the rules applicable to Cases I and II of Schedule D, the building of a factory, warehouse or shop is

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in one sense "for the purposes of the trade," but such expenses are clearly not deductible. In rule 3 (*a*) expenses "for the "purposes of the trade" must be incidental to the earning of profit in carrying on the trade. But the expenses here incurred are directed solely to the question: Who shall own the trade? Clearly they are not deductible.

(3) The question here is whether rule 3 (*a*) covers expenditure by a person in order to secure that he himself carries on his trade as opposed to anyone else, i.e., whether one can properly interpret rule 3 (*a*) as if "for the purposes of the trade" meant "for the "purposes of his trade." This is not so. The words refer to the trade by whomsoever it may be carried on. There is a distinction between the trade and the person carrying it on. The trade may continue though the ownership may change.

As to nationalization: (a) The acquisition by the State of the business of a company has not the object of destroying the business or the assets. Opposition to it, therefore, is opposition not to its destruction but to its transfer. (b) One form of nationalization is the compulsory transfer of the shares or stock to a nominee of the Treasury or to a public body. In that form the company remains in existence and retains its business and assets. In one form of nationalization one gets new owners of the business, in the other new owners of the shares. There is no substantial difference between the two forms. In either case the object of nationalization is not to injure or destroy the business or assets. Expenditure for preventing either does not fall within rule 3 (*a*) as laid out for the purposes of the trade.

Even if the directors of the company are convinced that nationalization would harm the business, expenditure on antinationalization propaganda is not a trading purpose, for a permissible deduction must be an expense incurred for the purpose of earning profits: see *City of London Contract Corporation Ld.* v. *Styles* [1]; *Gresham Life Assurance Society* v. *Styles* [2] and *Inland Revenue Commissioners* v. *Dowdall, O'Mahoney & Co. Ld.*,[3] which followed *Smith's Potato Estates Ld.* v. *Bolland*.[4] Reliance is also placed on *Strong & Co. of Romsey Ld.* v. *Woodifield*,[5] where the words of Lord Davey must not be read too literally, since he might just as well have spoken of the purpose of enabling the trade to be carried on and profits earned by it. These authorities established beyond a doubt that in order to come within rule 3 (*a*) the expense must be incurred in making a profit by carrying on the trade. Whether money is wholly and exclusively laid out for the purposes of the trade is a question of fact: *Smith* v. *Incorporated Council of Law Reporting for England and Wales.*[6] It must be wholly and exclusively laid out for a trading purpose: see *Smith* v. *Lion Brewery Co. Ld.*[7] *Usher's Wiltshire Brewery Ld.* v. *Bruce*[8] is distinguishable. *British Insulated & Helsby Cables Ld.* v. *Atherton*[9] does not depart from what was already laid down in *Strong & Co. of Romsey Ld.* v. *Woodifield.*[10] It does not establish that if expenditure cannot be labelled capital it is deductible. *Mitchell* v. *B. W. Noble Ld.*[11] lays down no new principle. It was no more than a case of a payment to get rid of a servant in the course of the company's business. *Ward & Co. Ld.* v. *Commissioner of Taxes*[12] is in many respects similar to the present case and the differentiation between them is not strong. The reasoning is very powerful.

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[1] (1887) 4 T.L.R. 51; 2 T.C. 239.

[2] [1892] A.C. 309, 315, 318; 8 T.L.R. 618.

[3] [1952] A.C. 401, 417, 422; [1952] 1 T.L.R. 560; [1952] 1 All E.R. 531.

[4] [1948] A.C. 508, 517, 521, 526; 64 T.L.R. 430; [1948] 2 All E.R. 367.

[5] [1905] 2 K.B. 350; 21 T.L.R. 550; [1906] A.C. 448, 453; 22 T.L.R. 754.

In the present case the Court of Appeal were wrong in reading the words in rule 3 (*a*) as if they were "for the purposes of his "trade." There is a clear line to be drawn between the trade on the one hand and the person who is taxed on the other. Expenses in connexion with ownership are not deductible. In the present case the respondent company was concerned, not with protecting the business, but with ownership only, for the trade after nationalization does not cease even though it may no longer be identifiable as a separate segment of the whole enterprise. In insurance much depends on what risk is being insured against in deciding whether the premiums are deductible for income tax purposes. Expenses not at all connected with carrying on the trade and earning its profits cannot be treated as a deductible expense. "Money spent to earn profits" accurately expresses the meaning of rule 3 (*a*).

The following examples may be considered: (1) If A enters into negotiations to buy a business to add to his own, the cost of buying that new business will not be deductible under rule 3 (*a*).

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[6] [1914] 3 K.B. 674, 684; 30 T.L.R. 588.

[7] [1911] A.C. 150, 156, 167; 27 T.L.R. 261.

[8] [1915] A.C. 433; 31 T.L.R. 104.

[9] [1926] A.C. 205, 211; 42 T.L.R. 187.

[10] [1905] 2 K.B. 350.

[11] [1927] 1 K.B. 719, 734–5; 43 T.L.R. 245.

[12] [1923] A.C. 145; 39 T.L.R. 90.

The purchase is not carrying on the business nor are the preceding negotiations (the employment of solicitors and valuers). It is not a capital expenditure, but it is not deductible because it is not incidental to earning profits in carrying on the trade.

(2) If A employs valuers to effect the purchase of a business and the sale goes off the expense is not deductible.

(3) If B wants to buy A's business, the cost of the solicitors employed by A will not be deductible from its profits, and if the purchase breaks down A still cannot deduct the costs incurred in connexion with the abortive sale.

(4) If B, instead of offering to buy the business and assets from a company, seeks to buy a controlling interest in its shares and the owners of the company do not wish this to happen for any reason, the expenses of the company in resisting the effort to buy a controlling interest are no more deductible than the expenses which they would have incurred if the shares had been disposed of by a willing vendor.

(5) If the proposal was that the State should acquire the stockholding, then the expenses incurred in resisting that would be in precisely the same position as the expenses of resisting a take-over bid by another company and neither would be deductible.

(6) If the nationalization proposal was to take over the business and assets at a valuation, then the valuation by the company being taken over would not be deductible and the costs of resisting the proposal to take over the business and assets would not be deductible.

(7) If the expenditure was incurred, as here, in order to defeat both forms of nationalization, then, even if expenditure to resist the transfer of the assets would be deductible, the expenditure incurred would not be wholly and exclusively laid out for the purposes of the company's trade.

The whole conception of rule 3 (*a*) is that the expense must come within the category of a trading expense. However reasonable an expense may be, it is not deductible unless it comes within that narrow field. *Boarland* v. *Kramat Pulai Ld.*[13] is a good example of expenditure which could not be deducted.

There may be cases where an expense not of a capital nature which the trader has been obliged to incur because of something done while he is trading may not be deductible, e.g., subscriptions to an association one of the objects of which is propaganda against nationalization or insurance against loss of profits: see *Rhymney*

[13] [1953] 1 W.L.R. 1332; [1953] 2 All E.R. 1122.

Iron Co. Ld. v. *Fowler*[14]; *Lochgelly Iron and Coal Co. Ld.* v. *Crawford*[15]; *Thomas Merthyr Colliery Co. Ld.* v. *Davis*[16]; *Inland Revenue Commissioners* v. *Warnes & Co. Ld.*[17]; *Inland Revenue Commissioners* v. *Alexander Von Glehn & Co. Ld.*[18]; *Van den Berghs Ld.* v. *Clark*[19]; *Rushden Heel Co. Ld.* v. *Keene*[20]; *Southern* v. *Borax Consolidated Ld.*[21]; *Associated Portland Cement Manufacturers Ld.* v. *Kerr*[22] and *Cooke* v. *Quick Shoe Repair Service.*[23]

It is clearly established by the cases that, in order to be capable of deduction, an expense must be one incidental to the earning of profits in the carrying on of the trade. The scope of the conception of " incidental " has been expanded as the years have gone on, but it has never been stretched so far as to apply to expenditure of the sort made here. It is important to recognize the test to be applied, although different courts may apply it differently to particular circumstances. Thus expenditure to prevent flooding or fire may in some circumstances be a deductible expense. It is clear that here the immediate purpose of the expenditure was to prevent a change of ownership, and it was not made solely because the company believed that in the State's hands the business would earn lower profits. It was made in order to retain its trade and assets. It was not related to the earning of profits.

Although " the trade " within the meaning of rule 3 (*a*) is the trade which the company is carrying on when the relevant expenditure is made, yet in an income tax context the trade must be regarded as an entity which can continue to exist after a transfer of ownership from one person to another: *Inland Revenue Commissioners* v. *Barr.*[24] Thus nationalization, even in the form of compulsory acquisition of the company's whole assets and undertaking, would not adversely affect its undertaking but would merely effect a transfer of ownership to the body constituted to carry it on. There was no question of preventing the carrying on of the trade. Accordingly, the money here in question was not spent to preserve the company's business and was not laid out "for the purposes of the trade," i.e., the trade by whomsoever it might be carried on. Further, it was spent on propaganda against the nationalization of the sugar industry and was not confined to the question of their own business.

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[14] [1896] 2 Q.B. 79; 12 T.L.R. 404.

[15] 1913 S.C. 810; 6 T.C. 267.

[16] [1933] 1 K.B. 349; 48 T.L.R. 633.

[17] [1919] 2 K.B. 444; 35 T.L.R. 436.

[18] [1920] 2 K.B. 553; 36 T.L.R. 463.

[19] [1935] A.C. 431; 51 T.L.R. 393.

[20] [1947] 1 All E.R. 699, 701; 30 T.C. 298; (H.L.) [1948] W.N. 283; [1948] 2 All E.R. 378.

[21] [1941] 1 K.B. 111; [1940] 1 All E.R. 412.

[22] (1945) 62 T.L.R. 115; [1946] 1 All E.R. 68.

[23] (1940) 30 T.C. 460.

[24] [1954] 1 W.L.R. 792; [1954] 2 All E.R. 218.

In summary, the sum expended by the company in carrying on its propaganda campaign against nationalization of the sugar refining industry was not an allowable deduction in ascertaining the profits arising from its trade for the purpose of the tax chargeable under Schedule D of the Income Tax Act, 1918. In the case stated it was not found as a fact that the object of this expenditure was to preserve the business and assets of the company. The campaign was not an activity in the trading of the company, which was that of the manufacture of refined sugar, and the expenses in carrying on that campaign were not incurred in the company's trading. Regard being had to the subject-matter of the charge to tax in Case I of Schedule D as being the profits arising from the company's trade, the amount expended on the campaign was not a proper debit in computing the profits.

Sir Reginald Hills following. *Thomas Merthyr Colliery Co. Ld.* v. *Davis* [25] indicates that sums spent on propaganda are not deductible. In *Smith* v. *Lion Brewery Co. Ld.*[26] the only reason for the Crown's contentions was that the expenses in question were said to be outside the trading activity. The submission of the Crown in the present case is clearly put by Evershed M.R. in *Rushden Heel Co. Ld.* v. *Keene.*[27] This case should not be decided on the analogy of the fire insurance cases like *Usher's Wiltshire Brewery Ld.* v. *Bruce.*[28] Much water has flowed under the bridge since *Ward & Co. Ld.* v. *Commissioner of Taxes,*[29] but it is still good law. The principle laid down by Lord Davey in *Strong & Co. of Romsey Ld.* v. *Woodifield* [30] has been applied over and over again. History has now gone beyond that case and it is clear that an expense in order to be deductible must be made in the course of carrying on the business and for the purpose of earning profits and must have the quality of a commercial outgoing. As to *Ward & Co. Ld.* v. *Commissioner of Taxes,*[31] the highest tribunals have given to the words of the United Kingdom statute the same meaning as they clearly have in the New Zealand Act considered in that case.

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[25] [1933] 1 K.B. 349, 366.

[26] [1909] 2 K.B. 912; 25 T.L.R. 748; [1911] A.C. 150.

[27] [1947] 1 All E.R. 699.

[28] [1915] A.C. 433.

[29] [1923] A.C. 145.

[30] [1906] A.C. 448, 453.

[31] [1923] A.C. 145.

The expenditure in the present case had the dual purpose to prevent the transfer of the business to another owner and the transfer of the shares to other shareholders. Accordingly it was not wholly and exclusively laid out for the purposes of the company's trade. One must have regard to the legal nature of the transaction: see *Smith's Potato Estates Ld.* v. *Bolland.*[32] It is wrong to say that because this expense may enable the trade to avoid being taken over it is deductible.

Millard Tucker Q.C., *Borneman Q.C.* and *Desmond Miller* for the respondent company. *Ward & Co. Ld.* v. *Commissioner of Taxes*[33] does not cover this case. It was decided under a differently worded Act. The words of Lord Cave,[34] "for the "direct purpose of producing profits," should be contrasted with his words in *British Insulated & Helsby Cables Ld.* v. *Atherton,*[35] "indirectly to facilitate the carrying on of the business." He there cited *Usher's Wiltshire Brewery Ld.* v. *Bruce.*[36] An example of an expense which can be deducted is *Moore* v. *Stewarts & Lloyds Ld.*[37]

The question in this case is whether expenditure directed to the retention of the ownership and control of the business and to determine who is going to carry on the trade is laid out for the purposes of the trade within rule 3 (*a*). It is so laid out, for it is not the trade as an entity that is to be looked at but the person who is carrying on the trade. This is supported by Lord Davey in *Strong & Co. of Romsey Ld.* v. *Woodifield,*[38] where he refers to "the purpose of enabling a person to carry on and earn profits "in the trade," words which exactly fit the present case, since it was threatened to prevent the company from carrying on the trade of sugar refining and the purpose of the expenditure was to avert the threat and enable the company to continue trading. As was so often the case at the time when that authority was established, the question was: Did this expenditure fall on the taxpayer in his capacity of trader or of property owner? That was the only question before the House. Lord Davey was not saying that it must be shown that the taxpayer incurred this expenditure in order to produce a profit; it must be incurred in order to enable him to put himself into a position to earn profits from his business.

It cannot be that every expense incurred must be designed to earn a profit. If an omnibus company owns an omnibus, which is negligently driven, so that the company has to pay damages, that is not expenditure for the purpose of earning a profit but for the purpose of enabling it to carry on its business, since the levying of execution would put it out of business. This is one example of expenses incurred in carrying on a trade which often have no immediate profit motive. A fine in respect of the negligent driving would not be a deductible expense because it would fall on the negligent driver not as a person engaged in trade but as an ordinary private citizen. The question whether a fine could be deducted might arise in the circumstances of *Southern* v. *A. B.*[39]

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[32] [1948] A.C. 508.

[33] [1923] A.C. 145.

[34] Ibid. 150.

[35] [1926] A.C. 205, 212.

[36] [1915] A.C. 433.

[37] (1906) 8 F. 1129; 6 T.C. 501.

[38] [1906] A.C. 448, 453.

The words of Lord Davey in *Strong & Co. of Romsey Ld.* v. *Woodifield*[40] were given the meaning for which the respondent company contends in *Inland Revenue Commissioners* v. *Dowdall, O'Mahoney & Co. Ld.*[41] Its argument is in harmony with his dictum and is not in conflict with anything which has since been said in the House.

On the case stated in the present case the House has the function of deciding whether the decision of the commissioners was right in point of law. They have found in paragraph (18) that the money " was wholly and exclusively laid out for the " purposes of the company's trade," and there is nothing in law to prevent their so finding. The Crown was saying that this expense could not be deducted, the taxpayer that it could. Each side gave its reasons and knew the other's contentions. It is clear from the company's contentions in the case stated that the propaganda campaign was entered into solely to preserve the company's assets. The relevant contentions were " (1) that the " expenses incurred in carrying out the propaganda campaign " against nationalization was for the sole purpose of preserving " the company's business and assets and thereby enabling it to " carry on its business. . . . (4) That on the facts proved the " object of the expenditure was to preserve the company's business " and assets, and that the ultimate form which nationalization " might take was immaterial. . . ."

If the directors had spent the money to prevent the acquisition of the shares of the stockholders, any stockholder could have got an order of the court to prevent that expense as being ultra vires. But the spending of money to prevent the seizure of the assets is within the company's memorandum and can be justifiably undertaken on the directors' own initiative. Admittedly if it had been intimated that the nationalization would take the form of the acquisition of the shares by a national body, and if the expenditure had been directed to opposing this, it would not have passed the test of rule 3 (*a*).

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[39] [1933] 1 K.B. 720; 49 T.L.R. 222.

[40] [1906] A.C. 448, 453.

[41] [1952] A.C. 401, 417.

When one is fighting something which is coming in the future and of which the exact form is unknown, then if one form would mean loss of the business and its assets, one must assume the worst and oppose nationalization in general, so as to make sure that the business is not lost, in the sense of the assets by which the trade is carried on, although the shield may be slightly larger than would be necessary to cover only one form of nationalization. There was no thought in the mind of the company of nationalization in the form of taking over the shares. When the Bank of England was nationalized all the stock was taken over by the Government from the original owners and the bank retained its old form. In the case of Cable & Wireless Ld. the Government likewise became the shareholders and the company still goes on. But in the case of coal, railways, electricity and gas the nationalization was in the form of taking the assets and businesses of the individual enterprises and merging them into another entity.

The action of the company in the present case was in accordance with the principles laid down in *Usher's Wiltshire Brewery Ld.* v. *Bruce.*[42] In a commercial sense this was a proper deduction and nothing prohibits it. Reliance is also placed on *Mitchell* v. *B. W. Noble Ld.*[43] and *Copeman* v. *William Flood & Sons Ld.*[44] *Southern* v. *Borax Consolidated Ld.*[45] was a case not different from the present one, save that here the court is dealing with the totality of the assets. The principles there laid down are still good law.

It is said by the Crown that the expenses were incurred in order to prevent the company being deprived of all its trading assets and that this was only an expense incurred for the purpose of deciding who was going to carry on the trade. But the object was to enable the company to carry on its trade activities and earn profits and accordingly it comes within Lord Davey's test in *Strong & Co. of Romsey Ld.* v. *Woodifield.*[46] There when he referred to "a person" he meant "the person," since he was speaking of the person then carrying on the trade from which the profits charged to tax under paragraph 1 (*a*) (ii) of Schedule D arise. The trade is a mere abstraction or notion. Thus a barrister cannot look at his profession; he carries on a number of activities which are known as his profession. Regarding the trade still in the hands of the existing owner, the only question under rule 3 (*a*) is one analogous to that in *Strong & Co. of Romsey Ld.* v. *Woodifield*,[46] which was whether the money was spent by the taxpayer as a landlord and not as a trader; if it was the latter, the sum was deductible. As to Lord Davey's dictum, one must consider the context in which it was placed, remembering that primarily one is construing the statute and not his words. To bring grist to the mill one must ensure that there is a mill to which the grist can be brought, and so rule 3 (*a*) includes the expenses of putting and keeping oneself in a position to earn profits. This was an instance of a trader defending his trading rights. One would never have heard of this case at all but for its political flavour. The question is not so much whether the expenditure was for trade purposes as whether, on ordinary commercial principles, it is a proper debit to be set against the profits. This was the evidence of the auditor of the company. Nothing in the Income Tax Acts disqualifies this expenditure from being so debited. The word "profits" may be used in two senses: see *British Sugar Manufacturers Ld.* v. *Harris*,[47] but subject to that, the right approach was indicated in *Usher's Wiltshire Brewery Ld.* v. *Bruce*.[48] These were expenses incurred to enable the company to continue in business and make profits. [*Fry* v. *Burma Corporation Ld.*[49] and *W. Neville & Co. Ld.* v. *Federal Commissioner for Taxation*[50] were also referred to.]

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[42] [1915] A.C. 433.

[43] [1927] 1 K.B. 719, 727, 734, 737, 738.

[44] [1941] 1 K.B. 202.

[45] [1941] 1 K.B. 111, 112, 116, 118.

[46] [1906] A.C. 448, 453.

Borneman Q.C. following. In *Ward & Co. Ld.* v. *Commissioner of Taxes*[51] the words of the New Zealand statute were stronger than those of the English Act: see the decision in that case in the Court of Appeal[52] and also *Commissioners of Taxation* v. *Kirk*.[53] *Ward & Co. Ld.* v. *Commissioner of Taxes*[54] has no relevance because of the different wording.

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[46] [1906] A.C. 448, 453.

[47] [1938] 2 K.B. 220, 237.

[48] [1915] A.C. 433.

[49] (1929) 15 T.C. 113, 119–20; (C.A.) [1930] 1 K.B. 249; [1930] A.C. 321.

[50] (1937) 56 C.L.R. 290.

[51] [1923] A.C. 145, 150.

[52] [1921] N.Z.L.R. 934, 940.

[53] [1900] A.C. 588, 591.

[54] [1921] N.Z.L.R. 934, 940.

As to the case stated, it is unfair to suggest that the commissioners have not drawn an inference of fact. Reading it as a whole and fairly it is clear that they found that the purpose of the expenditure was to preserve the company's assets, property and business undamaged by nationalization. In the case of an individual it is easy to find what his intention was. In the case of a company it must be inferred, since one can attach a purpose to a company only by a legal fiction. The resolution at the general meeting set out the company's intention and there is nothing to show that it was a mere façade. Accordingly its terms should be given their full normal meaning. There is nothing to show that the company ever changed its mind in the matter. The reference to "chaos, losses and labour unrest" indicates a fear of the diminution of profits in the event of nationalization by whatever means it was brought about.

Sir Reginald Manningham-Buller Q.C., S.-G., in reply. This case raises a point never previously decided by the House of Lords. *Ward & Co. Ld.* v. *Commissioner of Taxes* [55] was rightly decided. No such contrast as that suggested by the respondents is to be deduced from Lord Cave's words between a direct and an indirect purpose in this connexion. Though in that authority there was a difference between the form of wording of the New Zealand statute and the English Act now in question, there is no ground for saying that the law of the two countries differs. Any doubt arising out of that case is solved by *Inland Revenue Commissioners* v. *Dowdall, O'Mahoney & Co. Ld.*[56] and *Smith's Potato Estates Ld.* v. *Bolland.*[57] The reasoning of *Ward & Co. Ld.* v. *Commissioner of Taxes* [58] applies to this case and is valuable, particularly the passage towards the end of the judgment which conveniently expresses the law of this country, making a distinction between something spent in relation to trading activities and something spent to prevent the destruction of an asset. It cannot be said that the purpose of preventing the extinction of a business is the same as the purpose of producing income, and an expense for the former purpose is not deductible.

Three questions arise for determination: (1) Was this expenditure made for the purpose of earning profits? (2) Was it capital expenditure? (3) If it was not capital expenditure was it wholly and exclusively for the purposes of the trade? The answer to all is in the negative. Expenditure may not fall within the first

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[55] [1923] A.C. 145.
[56] [1952] A.C. 401.
[57] [1948] A.C. 508.
[58] [1923] A.C. 145, 149.

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class even if properly made: see *Rushden Heel Co. Ld.* v. *Keene*[59]; *Smith's Potato Estates Ld.* v. *Bolland*[60]; *Inland Revenue Commissioners* v. *Warnes & Co. Ld.*[61]; *Inland Revenue Commissioners* v. *Alexander Von Glehn & Co. Ld.*[62]; *Thomas Merthyr & Co. Ld.* v. *Davis*[63]; *Boarland* v. *Kramat Pulai Ld.*[64] and *Strong & Co. of Romsey Ld.* v. *Woodifield.*[65] Another possible case might be a charity subscription connected with the trade. The question is not concluded by showing that the expense was included in the profit and loss account. As to the point of capital expenditure, see *British Insulated & Helsby Cables Ld.* v. *Atherton*[66] and *Van den Berghs Ld.* v. *Clark.*[67] This expenditure was not incurred wholly and exclusively for the purposes of the trade. The only conclusion to which the commissioners could properly have come on the evidence was that the money was spent to prevent nationalization, whatever form it took. There was no positive threat of shutting the business down; the position might have been different if there had been. The test is not whether the money was expended as a trader or in some other capacity. To consider the capacity is helpful but it is not conclusive. The fact that one spends money as a trader does not make every item of expenditure a trade expense.

Southern v. *Borax Consolidated Ld.*[68] is very far away from the present case.

Their Lordships took time for consideration.

June 1. LORD MORTON OF HENRYTON. My Lords, the respondent company (hereafter referred to as "the company") claims that a sum expended by it in carrying out a "campaign" against the nationalization of the sugar refining industry was deductible in computing its profits, for the purpose of assessment to income tax under Case I of Schedule D of the Income Tax Act, 1918, for the year ended April 5, 1951. The amount claimed is £15,339 15s. 2d., but it is intended that the precise amount shall be agreed between the parties if your Lordships uphold this claim in principle.

The case turns upon the wording of rule 3 (*a*) of the rules applicable to Cases I and II of Schedule D, but other portions of the Income Tax Act, 1918, should be quoted. Section 209 (1) provides: " In arriving at the amount of profits or gains for the " purpose of income tax—(*a*) no other deductions shall be made " than such as are expressly enumerated in this Act. . . ." Schedule D, paragraph 1 (*a*) (ii) is as follows: " Tax under this " Schedule shall be charged in respect of—(*a*) the annual profits " or gains arising or accruing . . . (ii) to any person residing in " the United Kingdom from any trade, profession, employment, " or vocation, whether the same be respectively carried on in the " United Kingdom or elsewhere." Paragraph 2 provides: " Tax " under this Schedule shall be charged under the following cases " respectively; that is to say—Case I. Tax in respect of any trade " not contained in any other Schedule." The rule applicable to Case I of Schedule D is: " The tax shall extend to every trade " carried on in the United Kingdom or elsewhere, . . . and shall " be computed on the full amount of the balance of the profits " or gains . . ." The rules applicable to Cases I and II, so far as relevant, are as follows: " 1.—(1) The tax shall be charged " without any other deduction than is by this Act allowed. . . ." " 3. In computing the amount of the profits or gains to be " charged, no sum shall be deducted in respect of—(*a*) any " disbursements or expenses, not being money wholly and " exclusively laid out or expended for the purposes of the trade, " profession, employment or vocation. . . . (*f*) any capital withdrawn from, or any sum employed or intended to be employed " as capital in such trade, profession, employment or vocation."

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[59] [1948] W.N. 283; [1948] 2 All E.R. 378.

[60] [1948] A.C. 508.

[61] [1919] 2 K.B. 444.

[62] [1920] 2 K.B. 553.

[63] [1933] 1 K.B. 349.

[64] [1953] 1 W.L.R. 1332.

[65] [1906] A.C. 448.

[66] [1926] A.C. 205.

[67] [1935] A.C. 431.

[68] [1941] 1 K.B. 111.

I pause to say that I agree with the comment of Jenkins L.J.[1]: " It has long been well settled that the effect of these " provisions as to deductions is that the balance of the profits and " gains of a trade must be ascertained in accordance with the " ordinary principles of commercial trading, by deducting from " the gross receipts all expenditure properly deductible from them " on those principles, save in so far as any amount so deducted " falls within any of the statutory prohibitions contained in the " relevant rules, in which case it must be added back for the " purpose of arriving at the balance of profits and gains assessable " to tax. See *Usher's Wiltshire Brewery Ld.* v. *Bruce*,[2] *per* " Lord Loreburn,[3] Lord Parker of Waddington,[4] Lord Sumner,[5] " and Lord Parmoor.[6] "

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[1] [1953] Ch. 601, 627; [1953] 2 All E.R. 162.

[2] [1915] A.C. 433; 31 T.L.R. 104.

[3] [1915] A.C. 433, 444.

[4] Ibid. 458.

[5] Ibid. 467–8.

[6] Ibid. 473–4.

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My Lords, the commissioners held that "the sum in question "was money wholly and exclusively laid out for the purposes of "the company's trade and was an admissible deduction from its "profits for income tax purposes," and their decision was upheld by Harman J. and by the Court of Appeal (Jenkins and Hodson L.JJ., Singleton L.J. dissenting).

The commissioners are the judges of fact, but they have not found for what purpose or purposes the sum in question was in fact laid out. Accordingly, your Lordships have first to decide this question, and have then to decide, as a question of law, whether expenditure for that purpose is or is not deductible for income tax purposes.

The facts are fully set out in the case stated, and for the present purpose I need only quote two paragraphs thereof, prefacing them by stating that in the year 1949 the directors of the company formed the view, for reasons set out in the case, that the nationalization of the sugar refining industry would become part of the Labour Party's considered official programme and they endeavoured, without success, to persuade the Policy Committee of the Labour Party to receive a deputation.

Paragraphs 8 and 10 of the stated case are as follows: [His Lordship read the paragraphs and continued:] My Lords, the purpose for which a company expends money can only be either the purpose of the directors, if they expend it under the powers conferred upon them by the memorandum and articles without the express sanction of a general meeting, or the purpose of the shareholders if that purpose is expressed at a general meeting. Here there is no conflict between the purpose of the directors and the purpose of the shareholders in general meeting. The passages which I have quoted from the case stated show that these bodies had one purpose only, namely, to prevent the seizure of the "business and assets" of the company. The sum in question was spent for that purpose. It would appear likely, from the documents exhibited to the case stated, that part of the sum was spent by the directors before September 15, 1949, but to my mind this fact is immaterial, as the purpose for which it was spent was the same throughout.

The Solicitor-General pointed out that nationalization of the sugar refining industry might have taken one or other of two forms, in the case of the company and of every other company in the industry, either (a) the acquisition of the business and assets of the company by a national body, or (b) the acquisition of the company's capital stock by a national body. He contended that the propaganda campaign had the dual purpose of (a) preventing the former type of nationalization and (b) preventing the latter type of nationalization, and that expenditure for either of these purposes was not expenditure for the purposes of the company's trade, within the meaning of rule 3 (*a*).

Mr. Millard Tucker, for the respondents, conceded that if the Labour Party had intimated that nationalization would take the form of acquisition of the company's capital stock by a national body, and if the expenditure had been directed to avoiding this form of nationalization, it would not have answered the test laid down by rule 3 (*a*). He accepted the Solicitor-General's argument that money laid out merely for the purpose of preventing a change in the identity of the stockholders could not be regarded as being laid out for the purposes of the trade.

My Lords, I am content to assume that the argument so accepted was correct in law, for there is no evidence that any such intimation was given, and there is abundant evidence that the money was laid out solely for the purpose which I have already stated. I have already quoted paragraphs 8 and 10, and Lord Lyle said, in his oral evidence, that he "had never thought of "the alternative method of nationalization by which the State "would have acquired all the capital stock of the company from "its members." Lord Lyle was the President of the board of directors and the only one of the three witnesses who was a director of the company at the time when the money was spent. Mr. W. R. Booth, who was secretary to the company when the money was spent and became a director later, said that it did occur to him that one way of nationalizing the company would be for the State to acquire all the capital stock, but there is no evidence that he communicated this thought to anyone else.

My Lords, thinking as I do that in fact the only purpose for which this money was expended was to prevent the seizure of the business and assets of the company, I now turn to consider whether expenditure for that purpose is deductible for the purpose of arriving at the balance of profits or gains assessable to tax.

I start with the evidence of Mr. John Arthur Nicholson, a chartered accountant. He was the last of the three witnesses called before the commissioners, and they stated that they accepted the evidence of all three witnesses. Mr. Nicholson stated that "in accordance with ordinary commercial accountancy prac-"tice" the sum in question "must be charged against the profits "to which it related." He added that "any item of expenditure "which did not produce a capital asset had to be so charged."

This evidence is not, of course, conclusive of the matter in issue. One must next inquire whether the deduction of the sum in question, for the purpose of arriving at the balance of profits and gains, is prohibited by any statutory provision. The Solicitor-General did not contend in this House that the expenditure was of a capital nature, but relied solely upon the prohibition in rule 3 (*a*) already quoted. Thus there arises a question of law, which may be stated as follows:—Can it properly be held that money spent to prevent seizure by the State of the company's assets, including the goodwill of the business carried on by the company, is money "wholly and exclusively laid out or expended for "the purposes of the trade" within the meaning of rule 3 (*a*)? I pause to point out that "the trade" referred to in rule 3 (*a*) can only be the trade of the company asserting that the expenditure in question is a proper deduction. It is the profits of that trade, and no other, which are being ascertained, and the question is whether the sum spent was wholly and exclusively laid out for the purposes of that trade. I should have thought it unnecessary to state this, had not some discussion arisen at the hearing as to whether the commissioners had put a "gloss" upon rule 3 (*a*) by referring in their finding to "the company's trade."

My Lords, apart from authority I should have no hesitation in answering the question just posed in the affirmative. Looking simply at the words of the rule I would ask: "If money so spent "is not spent for the purposes of the company's trade, for what "purpose is it spent?" If the assets are seized, the company can no longer carry on the trade which has been carried on by the use of these assets. Thus the money is spent to preserve the very existence of the company's trade.

The same result follows if I apply to the present case the oft-quoted observation of Lord Davey in *Strong & Co. of Romsey Ld.* v. *Woodifield*,[7] in regard to the words "for the purposes of "such trade" in the corresponding provision of the Income Tax Act, 1842. "These words," said Lord Davey, "are used in other "rules, and appear to me to mean for the purpose of enabling a "person to carry on and earn profits in the trade, etc. I think "the disbursements permitted are such as are made for that "purpose. It is not enough that the disbursement is made in the "course of, or arises out of, or is connected with, the trade, or "is made out of the profits of the trade. It must be made for "the purpose of earning the profits." The last sentence of this observation has sometimes been quoted in isolation, but it cannot be supposed that in this one short passage Lord Davey intended to ascribe two different meanings to the words in question, and if his observation is read as a whole, I think it is clear that the last sentence in no way qualifies or alters the statement as to the meaning of the words in question which is contained in the first sentence. Applying that statement to the facts of the present case, the " person " to whom Lord Davey refers is surely the person who seeks to deduct the sum in question, i.e., the company, and it seems to me that money expended to prevent seizure of the company's assets is accurately described as money expended " for the purpose of enabling the company to carry on " and earn profits in the trade," since without its assets it could not carry on its business.

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[7] [1906] A.C. 448, 453; 22 T.L.R. 754.

My Lords, in my opinion no one of the cases, dealing with the Income Tax statutes of this country, which were cited in argument, throws any doubt upon the view which I have just expressed, and four at least of these cases support that view. In *Mitchell* v. *B. W. Noble Ld.*[8] a payment made to secure the withdrawal of a director was held to be deductible, both by Rowlatt J. and by the Court of Appeal, and Sargant L.J. said: " Now, first, " as to the question whether this was a disbursement wholly and " exclusively laid out or expended for the purposes of the trade, " it seems to me that there is nothing at all to show that it was " not so exclusively laid out. The object, as disclosed by paragraph 9 of the case, was that of preserving the status and " reputation of the company, which the directors felt would be " somewhat imperilled by the other director remaining in the " business or by a dismissal of him against his will, involving " proceedings by way of action in which the good name of the " company might suffer. To avoid that and to preserve the status " and dividend earning power of the company seems to me a " purpose which is well within the ordinary purposes of the trade, " profession or vocation of the company." I can see no distinction in principle between a payment made to preserve the status and dividend-earning power of the company and a payment made to prevent seizure of the company's profit-earning assets. It is interesting to note that in *W. Nevill & Co. Ld.* v. *Federal Commissioner of Taxation*[9] the High Court of Australia arrived at the same conclusion, on similar facts, when construing the narrower wording of section 25 (*e*) of the Income Tax Assessment Act, 1922–1932, "wholly and exclusively laid out or expended for "the production of assessable income."

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[8] [1927] 1 K.B. 719, 738; 43 T.L.R. 245.

[9] (1937) 56 C.L.R. 290.

The case of *Southern* v. *Borax Consolidated Ld.*[10] has a strong bearing upon the present case. There the company was in danger of losing a valuable asset, not by confiscation but by legal proceedings attacking the company's title to that asset. Lawrence J. held that the expense of resisting these proceedings was deductible, and said: "It appears to me that "the legal expenses which were incurred by the respondent "company did not create any new asset at all, but were expenses "which were incurred in the ordinary course of maintaining the "assets of the company and the fact that it was maintaining the "title and not the value of the company's business does not, in "my opinion, make it any different." This decision was approved by the Court of Appeal in *Associated Portland Cement Manufacturers Ld.* v. *Kerr*,[11] and was applied by Croom-Johnson J. in *Cooke* v. *Quick Shoe Repair Service.*[12]

Further, I derive assistance from the dicta of Scrutton L.J. in *Smith* v. *Incorporated Council of Law Reporting for England and Wales*[13]: "There may be cases where it is clear even to a "judge who knows nothing about the trade, that a particular "payment could not be wholly or exclusively laid out for the "purposes of the trade. I do not desire to discuss politics, but I "take examples which seem to me fairly clear. Payments for "political purposes might conceivably be for the purposes of "trade. It might be that a payment by a company to the Tariff "Reform League might be of great advantage to its trade. It "might be that a payment by a company to a political party "which was supposed to be identified with the interests of a "particular trade might be to the advantage of the trade; but "one can easily imagine cases, such as a payment by a company "to the National Service League, where it would be impossible "to conceive that anybody could find that such money was "wholly or exclusively laid out or expended for the purposes of "the trade."

The Solicitor-General relied strongly upon the case of *Ward & Co. Ld.* v. *Commissioner of Taxes.*[14] In that case the Judicial Committee of the Privy Council had to consider the language of section 86 (1) (*a*) of the New Zealand Land and Income Tax Act, 1916, which provides as follows: "In calculating "the assessable income derived by any person from any source "no deduction shall be made in respect of . . . (*a*) expenditure "or loss of any kind not exclusively incurred in the production "of the assessable income derived from that source." The expense in question was incurred by a brewery company in financing a campaign to persuade the public to vote against the prohibition of the sale of intoxicating liquors, at a poll which was about to be taken. It was held by the Judicial Committee that this expense was not deductible, on the true construction of the New Zealand Act, and I think it is desirable to quote the reasoning of the Board in full. It is as follows [15]: "The conclusion of "the Court of Appeal upon this point is contained in the following "passage in the judgment of that court: 'The question, therefore, "'is: Was the expenditure under consideration exclusively "'incurred in the production of the assessable income, for unless "'it was so, the Act expressly prohibits its deduction from such "'income. This question must, we think, be answered in the "'negative. We find it quite impossible to hold that the "'expenditure was incurred exclusively, or at all, in the production of the assessable income. It was incurred not for the "'production of income, but for the purpose of preventing the "'extinction of the business from which the income was derived, "'which is quite a different thing. It was contended by the "'company that it was illogical that while legitimate expenses "'incurred in the production of the income are deductible, similar "'expenses incurred for the much more important purpose of "'keeping the profit-making business alive are not deductible, "'and, further, that it was inequitable that the legislature "'should, on the one hand, force a certain class of traders into "'a struggle for their very existence, and, on the other hand, "'treat the reasonable expenses incurred in connexion with such "'struggle as part of the profits assessable to income tax. These "'aspects of the matter are clearly and forcibly set out in the "'contentions of the company as embodied in the correspondence "'with the commissioner contained in the case, but they raise "'questions which can only be dealt with appropriately by the "'legislature. This court, however, cannot be influenced by "'such considerations, being concerned only with the interpretation and application of the law as it stands.'

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[10] [1941] 1 K.B. 111, 120; [1940] 4 All E.R. 412.

[11] (1945) 62 T.L.R. 115, 117; [1946] 1 All E.R. 68.

[12] (1949) 30 T.C. 460

[13] [1914] 3 K.B 674, 684; 30 T.L.R. 588.

[14] [1923] A.C. 145; 39 T.L.R. 90.

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[15] [1923] A.C. 145, 149.

"Their Lordships agree with this reasoning. The expenditure in question was not necessary for the production of profit, "nor was it in fact incurred for that purpose. It was a voluntary "expense incurred with a view to influencing public opinion "against taking a step which would have depreciated and partly "destroyed the profit-bearing thing. The expense may have been "wisely undertaken, and may properly find a place, either in the "balance sheet or in the profit-and-loss account of the appellants; "but this is not enough to take it out of the prohibition in "section 86 (1) (*a*) of the Act. For that purpose it must have "been incurred for the direct purpose of producing profits. The "conclusion may appear to bear hardly upon the appellants; but, "if so, a remedy must be found in an amendment of the law, the "terms of which are reasonably clear. It is only necessary to add "that the decisions on the English Income Tax Acts, the language "of which is different from that of the New Zealand Act, have no "real bearing upon the question now under decision."

In my view, this case is of no assistance to the Crown, having regard to the difference in language which is pointed out by the Board in the last sentence just quoted. The language of the New Zealand statute is much narrower than that of rule 3 (*a*), and I think that if the Board had been applying rule 3 (*a*) to the facts in the New Zealand case its decision might have been to the opposite effect. It is noteworthy that Lord Cave, in delivering the judgment of the Board, said that in order to take the expense in question out of the prohibition of section 86 (1) (*a*) of the New Zealand Act, "it must have been incurred for the "*direct* purpose of producing profits." With this observation should be contrasted the observation of Lord Cave, only three years later, in regard to rule 3 (*a*) in *British Insulated & Helsby Cables Ld.* v. *Atherton*[16]: "It was made clear in . . . *Usher's "Wiltshire Brewery Ld.* v. *Bruce*[17] and *Smith* v. *Incorporated "Council of Law Reporting for England and Wales*[18] that a sum "of money expended, not of necessity and with a view to a "direct and immediate benefit to the trade, but voluntarily and "on the grounds of commercial expediency, and in order *indirectly* "to facilitate the carrying on of the business, may yet be "expended wholly and exclusively for the purposes of the trade; "and it appears to me that the findings of the commissioners in

[16] [1926] A.C. 205, 211–2; 42 T.L.R. 187.

[17] [1915] A.C. 433.

[18] [1914] 3 K.B. 674.

" the present case bring the payment in question within that " description."

The Crown also called in aid the recent decision of Danckwerts J. in *Boarland* v. *Kramat Pulai Ld.*,[19] but I do not find that case of any assistance, as the judge took the view that the expenditure in question had two objects, one of which was not for the purposes of the company's trade.

I come now to the last argument advanced on behalf of the Crown, which may, I think, fairly be stated as follows: (1) Although " the trade," within the meaning of rule 3 (*a*) is no doubt the trade which the company was carrying on when the sum in question was spent, yet the trade of a company or of any other trader is regarded by the Income Tax Acts as being an entity which can continue to exist notwithstanding that its ownership is transferred from one company or person to another company or person. (2) This proposition is established beyond all question by the speeches recently delivered in this House in *Inland Revenue Commissioners* v. *Barr.*[20] (3) Nationalization, even in the form of a compulsory acquisition of the whole of the assets and undertaking of the company, would not destroy or adversely affect the company's business but would merely transfer it from the ownership of the company into the ownership of whatever body or authority the nationalizing legislation might constitute for the purpose of carrying it on; thus the expenditure in question was not laid out for the purpose of preserving the company's business, but for the purpose of preventing the company's business from being taken away from the company and transferred to, and thenceforth carried on by, the new body or authority. (4) A sum expended to resist such a transfer is not " laid out for the purposes of the company's trade."

My Lords, I find this argument unconvincing. Propositions (1) and (2) are correct, but irrelevant for the present purpose, for the question is not whether a trade can continue to exist after a change of ownership, but: " Is money spent by a company to " prevent seizure of its assets ' money laid out for the purposes of " ' the trade ' within the meaning of rule 3 (*a*) ?" For the solution of this question I derive no assistance from anything that was said in *Inland Revenue Commissioners* v. *Barr*[20] or from any of the provisions of the Income Tax Acts which were cited in argument. In *Inland Revenue Commissioners* v. *Barr*[20] the only question was whether a trade was "permanently discontinued" within the meaning of section 17 (1) of the Income Tax Act, 1945, merely because it had been sold by one person to another, notwithstanding that the business was sold as a going concern, and it was found as a fact that "after the sale the business was carried "on and continued as if there had been no change" of ownership. The other provisions of the Income Tax Acts which were cited in argument related to the taxation of profits in cases where there had been some change in the persons who owned the business, but the business had not been discontinued as a result of such change. These matters seem to me very remote from the question now under consideration.

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[19] [1953] 1 W.L.R. 1332; [1953] 2 All E.R. 1122.

[20] [1954] 1 W.L.R. 792; [1954] 2 All E.R. 218.

As to (3), this seems to me to be an assumption wholly unwarranted by the evidence. There is no evidence that a transfer of the assets to a national body or authority would not destroy or adversely affect the company's business. The whole of the assets might be merged with those of some other company compulsorily taken over, and by these or other means the business at present carried on by the respondent company might cease to exist. It is true that, when a transfer of a business has been carried out, it is possible to look back to what was actually done by the transferee after the transfer and to decide whether or not the business has ceased to exist: see *Inland Revenue Commissioners* v. *Barr*[20] and cases there cited. It is, however, impossible to say in advance what the transferee will do with the business. He may put an end to it altogether, as I have pointed out. It is equally impossible to say in advance whether the transfer will or will not adversely affect the business. In the present case the resolution set out in paragraph 8 of the case stated, already quoted, and the speeches of Lord Lyle at that meeting, which are exhibited to the case, show that the shareholders and the directors were strongly of opinion that the efforts of the "nationalizers" would cause "chaos, losses and labour unrest." They may have been right or wrong in so thinking; but there can be no doubt that they did think that the transfer of assets, which they spent money to avert, would cause serious damage to the company's assets and profits.

The fourth proposition, deprived of any support from propositions (1), (2) and (3), must amount to a mere statement that in no circumstances can it properly be held that a sum laid out to prevent the seizure of the whole of the company's business and assets is laid out "for the purposes of the trade" within the meaning of rule 3 (*a*). This proposition is wholly unsupported by authority and is difficult to reconcile with the case of *Southern* v. *Borax Consolidated Ld.*[21] already cited. If expense for the purpose of preserving the ownership of one asset of a company is deductible, why is not expense for the purpose of preserving the ownership of all the assets also deductible? Further, the proposition is, in my opinion, contrary to the view of Lord Davey, already quoted, as to the meaning of rule 3 (*a*)—a view which has been accepted more than once by this House. The proposition places a wholly unnecessary and unwarranted restriction upon the meaning of the words of rule 3 (*a*). They are not technical words and ought not to be given a narrow or technical construction. It is clear that the commissioners must have rejected the proposition and it was successively rejected by Harman J. and by the Court of Appeal. I see no reason for differing from their conclusions, and I would accept entirely the following observations of Jenkins and Hodson L.JJ.

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[20] [1954] 1 W.L.R. 792.

Jenkins L.J. said[22]: "I confess myself unable to follow this "argument. The trade with which we are here concerned is "surely the trade carried on by the company; the purposes for "which the disputed expenditure, in order to be allowable as a "deduction, must be shown to have been laid out are surely the "purposes of the trade so carried on; and when Lord Davey in "*Strong & Co. of Romsey Ld.* v. *Woodifield*[23] (see above) "explained expenditure for the purposes of the trade as expenditure for the purposes of enabling a person to carry on and earn "profits in the trade, surely he meant for the purpose of enabling "the trader claiming to deduct that expenditure to carry on and "earn profits in *his* trade. It is clear on the authorities that "Lord Davey's formula includes expenditure for the purpose of "preventing a person from being disabled from carrying on and "earning profits in the trade. Here, too, it seems to me reasonably plain that the relevant trade is that of the trader claiming "to make the deduction. There is no doubt that legislation "compulsorily divesting a trader of the whole of the assets and "goodwill of his business, and (one may suppose) precluding him "from establishing any similar business in the future, would "utterly disable him from carrying on and earning profits in his "trade."

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[21] [1941] 1 K.B. 111.

[22] [1953] Ch. 601, 640.

[23] [1906] A.C. 448.

Hodson L.J. said [24]: "In my opinion the expenditure is a "proper debit item to be charged against the incomings of the "trade when computing the balance of the profits of it, and is "none the less a proper revenue charge because it is laid out "for the purpose of preserving the assets of the company. It is "not, I think, a good answer to say that the asset is not in "danger and the only question is a change of ownership. If the "trader has his business taken from him by the State, whatever "form nationalization may take, he cannot continue to carry on "his trade. Accordingly, expenditure laid out in protecting him-"self against nationalization is directed towards enabling him to "retain the trade which he is carrying on."

The commissioners have found that the sum in question was an admissible deduction from the profits of the company for income tax purposes, and there is, in my view, no reason in law which prevents them from so finding. I would dismiss the appeal with costs.

My Lords, my noble and learned friend, Lord Asquith of Bishopstone, who is unable to be present today, asks me to say that he has read my opinion and that he finds himself in full agreement with it.

LORD REID. My Lords, in 1949 the respondent company spent £15,339 on a propaganda campaign against nationalization of their business and they maintain that that sum is a proper deduction in arriving at their profit for income tax purposes. The commissioners accepted evidence of a chartered accountant that, in accordance with ordinary commercial accountancy practice, this sum must be charged against profit. The question is whether there is anything in the Income Tax Acts to prohibit the deduction for income tax purposes. The appellant relies on rule 3 (*a*) of the Rules applicable to Schedule D, Cases I and II. That rule provides: "No sum shall be deducted in respect of any disburse-"ments or expenses, not being money wholly and exclusively laid "out or expended for the purposes of the trade."

It was agreed that, in order to determine for what purposes money was spent, it is necessary to ascertain what was in fact the purpose of the trader in spending the money. In this case the trader was a limited company which in the eye of the law is a person distinct and different from the shareholders or any of them, and such an artificial person cannot in any real sense

[24] [1953] Ch. 601, 646.

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have a purpose. But the purpose of the body which was entitled to act and did act for the company must be held to be the company's purpose. On September 15, 1949, the stockholders at an extraordinary meeting passed a resolution which I shall deal with later. But it appears from documents annexed to the case that at least a large part of the money must have been spent before that date by the board of directors, and therefore I turn first to see what was the purpose of the board.

In the case stated the commissioners set out fully the evidence which was before them and which they accepted, and then they state that they "found that the sum in question was money "wholly and exclusively laid out for the purposes of the company's trade," but they do not state specifically what the purposes were. The purpose of a person or of a board of directors in spending money is a pure matter of fact. It may be that it can only be ascertained by drawing an inference from other facts, but the commissioners are entitled to draw inferences. Probably they did so in this case, but, as their conclusion is not expressed, and from reading the case I cannot feel satisfied that I know what it was, I find it necessary to examine the case and draw my own inference.

[His Lordship stated the facts and continued:] The proposal which the directors were opposing was the transfer to public ownership of their sugar refining concern. If that proposal became law the company would lose its business and assets. I think that it is reasonably clear that the dominant purpose of the directors was to prevent the company from losing its business and to preserve its assets intact. People often have more than one reason for forming a purpose, and I think that the facts found in the case indicate that the directors had two main reasons. They believed that nationalization would be disastrous to the industry and that it would cause loss to the shareholders. Whether their beliefs were right or wrong is quite immaterial. The question whether their purpose can be held to come within the terms of rule 3 (*a*) does not depend on whether or not their purpose was misconceived.

The shareholders' purpose and reasons are set out in the resolution of September 15, and there is nothing in the case to indicate that its terms do not reflect their real purpose and reasons. Their purpose was to prevent the assets of the company being seized and their reasons were that such seizure would harm workers, consumers and themselves alike. Again it does not matter whether those reasons were good or bad.

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It was maintained by the appellant at one stage that this expenditure was not wholly and exclusively laid out for the purposes of the respondents' trade because their propaganda was directed against nationalization of the industry of sugar refining as a whole, and was not confined to opposition to compulsory acquisition of their own concern. But this argument has now been given up. If the propaganda was to be effective it had to be on broad lines, and the fact that it would also benefit other concerns does not matter if the purpose was to preserve the respondents' own concern.

The question of law which has to be determined is whether expenditure for the purpose of preventing the company from losing its business and preserving its assets intact can be expenditure "for the purposes of the trade" within the meaning of rule 3 (*a*). The appellant's main argument was that this expenditure was wholly directed to the question of who should own the trade, and was not in any way incidental to the earning of profit in carrying on the trade: the respondents' "trade" was an entity which could and would continue in existence after it had been nationalized, and that trade could not benefit in any way from this expenditure. There are many authorities which deal with the meaning of the phrase "the purposes of the trade," and although none is directly in point I find it necessary to examine several for the light which they throw on this case.

The appellant founds strongly on the decision of the Privy Council in *Ward & Co. Ld.* v. *Commissioner of Taxes*.[25] That was an appeal from New Zealand where the rule corresponding to rule 3 (*a*) is in different terms: it prohibits the deduction of expenditure "not exclusively incurred in the production of the "assessable income." In that case a brewery company spent money on an anti-prohibition campaign and their expenditure was held not to be deductible. In delivering the judgment of the Board Viscount Cave L.C. said [26]: "The expenditure in question "was not necessary for the production of profit, nor was it in fact "incurred for that purpose. It was a voluntary expense incurred "with a view to influencing public opinion against taking a step "which would have depreciated and partly destroyed the profit-"bearing thing." But, he added: "It is only necessary to add "that the decisions on the English Income Tax Acts, the "language of which is different from that of the New Zealand Act, "have no real bearing upon the question now under decision." I

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[25] [1923] A.C. 145.

[26] Ibid. 149, 150.

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contrast that with what Lord Cave said three years later in *British Insulated & Helsby Cables Ld.* v. *Atherton*[27]: "It was made "clear in the above cited cases of *Usher's Wiltshire Brewery Ld.* "v. *Bruce*[28] and *Smith* v. *Incorporated Council of Law Reporting for England and Wales*[29] that a sum of money expended, "not of necessity and with a view to a direct and immediate "benefit to the trade, but voluntarily and on the grounds of "commercial expediency, and in order indirectly to facilitate the "carrying on of the business, may yet be expended wholly and "exclusively for the purposes of the trade." If that is a correct statement of the law in England—and I think it is—it is not difficult to see why the Board in *Ward's* case[30] said that the English decisions had no real bearing on the question in *Ward's* case.[30] And if that is so, then it appears to me that the converse must be true: *Ward's* case[30] has no real bearing on the question now before your Lordships.

In *Usher's Wiltshire Brewery Ld.* v. *Bruce*[31] the company were held entitled to deduct sums which they had expended in aid of their tenants in their tied houses. That expenditure, though it was made voluntarily and though it was also of benefit to the tenants, was made for their own benefit because it promoted the sale of their beer. Lord Sumner said[32]: "Where the whole and "exclusive purpose of the expenditure is the purpose of the "expender's trade, and the object which the expenditure serves "is the same, the mere fact that to some extent the expenditure "enures to a third party's benefit, say that of the publican, or "that the brewer incidentally obtains some advantage, say in his "character of landlord, cannot in law defeat the effect of the "finding as to the whole and exclusive purpose." In that case the brewers were also held entitled to deduct certain fire and licence insurance premiums.

In *Smith* v. *Incorporated Council of Law Reporting for England and Wales*,[33] to which Lord Cave also referred, a retiring gratuity to one of the reporting staff was held deductible. In the course of his judgment Scrutton J. said[34]: "Payments for political purposes might conceivably be for the purposes of trade. "It might be that a payment by a company to the Tariff Reform "League might be of great advantage to its trade. It might be "that a payment by a company to a political party which was

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[27] [1926] A.C. 205, 211–2.
[28] [1915] A.C. 433.
[29] [1914] 3 K.B. 674.
[30] [1923] A.C. 145.
[31] [1915] A.C. 433.
[32] Ibid. 469–70.
[33] [1914] 3 K.B. 674.
[34] Ibid. 684.

"supposed to be identified with the interests of a particular trade "might be to the advantage of the trade; but one can easily "imagine cases, such as a payment by a company to the National "Service League, where it would be impossible to conceive that "anybody could find that such money was wholly or exclusively "laid out or expended for the purposes of the trade." Those statements were obiter, but we were not referred to any later case where they were disapproved. In *Boarland* v. *Kramat Pulai Ld.*[35] the expense of distributing a chairman's speech containing general political propaganda was disallowed because protection of the business from injury was plainly not the sole object.

In *Mitchell* v. *B. W. Noble Ld.*[36] money paid to get rid of a director and save the company from scandal was held deductible. Rowlatt J. held that this was covered by the passage from the speech of Lord Cave which I quoted earlier. Sargant L.J. said[37] that to avoid the good name of the company suffering "and to preserve the status and dividend earning power of the "company seems to me a purpose which is well within the "ordinary purposes of the trade." And, dealing with an argument that one object had been to enable the other directors to gain personal benefits, he said[38]: ". . . a payment to ensure "the prosperity of the whole company was not, in my judgment, "in any way tarnished or rendered suspicious by the fact that "it would ultimately enure in a secondary sense for the benefit "of those who remained the directors and managers of the "company."

There are a number of other cases in which expense incurred in defending or preserving the existence of capital assets has been held to be deductible. In *Southern* v. *Borax Consolidated Ld.*[39] legal expenses in defending a title to land abroad were allowed. *Associated Portland Cement Manufacturers Ld.* v. *Kerr*[40] was a case rather like *Mitchell* v. *B. W. Noble Ld.*[41] Lord Greene M.R. there said[42]: "The money that you spend in defending "your title to a capital asset, which is assailed unjustly, is "obviously a revenue expenditure," and having said that it was not a capital expense, apparently he saw no reason why it should not be deductible. *Cooke* v. *Quick Shoe Repair Service*[43] somewhat resembled *Usher's Wiltshire Brewery*[44] in that the taxpayer, in order to maintain the goodwill of the business, voluntarily discharged certain liabilities which the vendor of the business had failed to discharge. He was held entitled to deduct these payments because they had been made to preserve an asset of the business.

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[35] [1953] 1 W.L.R. 1332.
[36] [1927] 1 K.B. 719.
[37] Ibid. 738.
[38] Ibid. 739.
[39] [1941] 1 K.B. 111.
[40] 62 T.L.R. 45.
[41] [1927] 1 K.B. 719.
[42] [1946] 1 All E.R. 68, 72.
[43] 30 T.C. 460.
[44] [1915] A.C. 433.

On the other hand, there are cases where it has been held that expenditure is not deductible because it was not incurred by the taxpayer in his capacity of trader. Payment of a fine is not an ordinary commercial loss (*Inland Revenue Commissioners* v. *Warnes & Co. Ld.*[45]); and insurance against loss owing to strikes has been held not to be deductible (*Rhymney Iron Co. Ld.* v. *Fowler*[46]; *Thomas Merthyr Colliery Co. Ld.* v. *Davis*[47]). I find these last cases difficult to follow and I cannot find that they throw any light on the present case. The ground of judgment is most clearly stated by Slesser L.J. in the latter case where he said[48]: "I find the greatest difficulty in taking the view that "an expense which is incurred exclusively for the purposes of "the trade can be extended to cover an expense wholly and "exclusively laid out for the purpose of protecting the trader "against the absence of trade." That may or may not be right in its context, but I do not think it sets out any general rule capable of wider application.

The case of *Strong & Co. of Romsey Ld.* v. *Woodifield*[49] was relied on by both sides. The brewery company owned an inn which was carried on as part of their business. A customer in the inn was injured by the fall of a chimney and he recovered damages from the company. It was held that the amount of the damages could not be deducted for income tax purposes. The ground of judgment was stated by Lord Loreburn L.C.[50]: "In my opinion, "however, it does not follow that if a loss is in any sense con- "nected with the trade, it must always be allowed as a deduc- "tion; for it may be only remotely connected with the trade, or "it may be connected with something else quite as much as or "even more than with the trade. I think only such losses can "be deducted as are connected with in the sense that they are "really incidental to the trade itself. They cannot be deducted "if they are mainly incidental to some other vocation or fall on "the trader in some character other than that of trader. . . . In

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[45] [1919] 2 K.B. 444; 35 T.L.R. 436.

[46] [1896] 2 Q.B. 79; 12 T.L.R. 404.

[47] [1933] 1 K.B. 349; 48 T.L.R. 633.

[48] [1933] 1 K.B. 349, 374.

[49] [1906] A.C. 448.

[50] Ibid. 452.

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" the present case I think that the loss sustained by the appellants " was not really incidental to their trade as innkeepers, and fell " upon them in their character not of traders, but of house-" holders." Lord Davey adopted a rather different ground: he said [51] " I think that the payment of these damages was not " money expended ' for the purpose of the trade.' These words " are used in other rules, and appear to me to mean for the " purpose of enabling a person to carry on and earn profits in the " trade, etc. I think the disbursements permitted are such " as are made for that purpose. It is not enough that the dis-" bursement is made in the course of, or arises out of, or is con-" nected with, the trade, or is made out of the profits of the " trade. It must be made for the purpose of earning the profits."

Before I comment on this I shall notice two recent cases in this House where these statements of the law were approved and applied. In *Smith's Potato Estates Ld.* v. *Bolland* [52] Lord Porter said with regard to excess profits tax: " It is true that a trader " only is liable to pay it, but it is not payable by him as a trader. " He pays as an individual, like any other individual, tax on the " sum which he has earned as a trader. ' To my mind,' said " Lord Selborne L.C. in *Mersey Docks and Harbour Board* v. " *Lucas*,[53] ' it is reasonably plain that the gains of a trade are that " ' which is gained by the trading, for whatever purposes it is " ' used ' and therefore what your Lordships have to determine is " whether the expense is incurred in order to earn gain or is the " application or distribution of that gain when earned." Lord Simonds said [54]: " It is, I think, important to emphasize that " the words ' for the purposes of the trade ' in their context, i.e., " where a computation of ' profits ' for the ascertainment of " taxable income is being made, must mean ' for the purpose of " ' enabling a person to carry on and earn profits in the trade.' " These familiar words I cite from Lord Davey's speech in *Strong* " *& Co. of Romsey Ld.* v. *Woodifield*.[55] . . . neither the cost of " ascertaining taxable profit nor the cost of disputing it with the " Revenue authorities is money spent to enable the trader to earn " profit in his trade." Lord Normand, who was also one of the majority, said [56]: " There is the more substantial reason, that " income tax is an impost made upon profits after they have been " earned, and that unless the observations of Lord Davey in *Strong*

[51] [1906] A.C. 448, 453.

[52] [1948] A.C. 508, 523: 64 T.L.R. 430: [1948] 2 All E.R. 367.

[53] (1883) 8 App.Cas. 891, 905.

[54] [1948] A.C. 508, 526–7.

[55] [1906] A.C. 448, 453.

[56] [1948] A.C. 508, 530.

"*& Co. of Romsey Ld.* v. *Woodifield*,[57] which have often been "referred to and applied in later cases, are to be disregarded a "payment out of profits after they have been earned is not within "the purposes of the trade carried on by the taxpayer." *Inland Revenue Commissioners* v. *Dowdall, O'Mahoney & Co. Ld.*[58] followed *Smith's Potato Estates*,[59] and also dealt with excess profits tax. I do not think that for present purposes it adds anything: it merely recognizes the distinction laid down in *Smith's Potato Estates*[59] between spending money for the purposes of earning profits and applying the profits when earned.

I have referred to a good many cases in which phrases like "money spent to earn profits" have been used by high authorities in referring to sums which are deductible. The Solicitor-General argued that these phrases accurately express the meaning of rule 3 (*a*), and that as the expenditure in this case cannot be directly related to the earning of profit it is therefore not deductible. I do not think that this argument is well founded. Lord Davey used the two expressions "for the purpose of enabling "a person to carry on and earn profits" and "for the purpose of "earning the profits" in close juxtaposition and he cannot have intended them to mean different things. He obviously intended the former to be the more accurate phrase because that is what he said he thought the words of the rule meant. Similarly Lord Simonds in the passages I have quoted from his speech in *Smith's Potato Estates*[60] first quoted the former phrase of Lord Davey and later referred to "money spent to enable the trader to earn "profit," and he also cannot have intended these phrases to have different meanings. I doubt whether in any case the shorter phrase was intended to be an accurate definition and I am satisfied that "purposes of the trade" in rule 3 (*a*) has a wider meaning than purposes directly related to the earning of profits. Defending or preserving a profit-earning asset of the business is within the purposes of the trade and that must apply equally to a single asset or a collection of assets.

It is convenient to deal now with another argument for the appellant. In most industries where nationalization had been effected before 1949 the assets of those engaged in the industry had been compulsorily acquired from them and vested in statutory bodies which used those assets to carry on the industry. But in two cases, the Bank of England and Cable & Wireless Ld., nationalization had been effected by compulsory transfer of all the stock or shares to Government nominees. It was admitted for the respondents that expenditure to resist the latter form of nationalization would not be expenditure for the purposes of the trade; and it was argued for the appellant that, as there is no substantial difference between these forms of nationalization in the result, it would be anomalous if expenditure to resist one form were deductible while expenditure to resist the other form were not. But in law there is an essential difference: the company is held in law to be a person entirely different from the shareholders, and the company is the trader, not the shareholders. By the first form of nationalization the company, the trader, is deprived of its assets. But by the latter form the company's position is unchanged; it retains its assets and continues to carry on its business. All that happens is that the new shareholders can alter its policy; but a change of shareholders does not interest the company as a trader, and expenditure to prevent a change of shareholders can hardly be expenditure for the purposes of the trade. It was argued that in the case of sugar refining nationalization might have taken either form and, therefore, the expenditure being directed against both forms was not wholly and exclusively laid out for the purposes of the trade. But I think that the facts stated in the case show that neither the directors nor the shareholders had in mind the latter form of nationalization and, if this be relevant, there is nothing in the case to show that they ought to have had it in mind. What they had in mind was that the company would remain in existence but would have its assets taken away (no doubt on payment of compensation) and would no longer be able to carry on the trade of sugar refining, and the question is whether expenditure to resist that is deductible as a trading expense.

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[57] [1906] A.C. 448, 453.

[58] [1952] A.C. 401; [1952] 1 T.L.R. 560; [1952] 1 All E.R. 531.

[59] [1948] A.C. 508.

[60] Ibid. 526–7.

That brings me to what is, to my mind, the most difficult question in this case. For the respondents it is said that Lord Davey's words "for the purpose of enabling a person to carry on "and earn profits in the trade" exactly fit the present case. The threat was to prevent the respondent company from carrying on their trade of sugar refining, and the purpose of their expenditure was to avert that threat and so enable them to carry on trading. On the other hand, it is said that that is taking Lord Davey too literally: he might equally well have said for the purpose of enabling the trade to be carried on and profits to be earned in it. In the present case it is said that there was no question of

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preventing the carrying on of the respondents' trade: the only proposal was that it should be carried on by some other body under national ownership. Taking the words of rule 3 (*a*) it is said that "for the purposes of the trade" means for the purposes of the trade by whomsoever it may be carried on because the Act regards the trade as something which continues notwithstanding that it passes from the ownership of one trader to that of another.

I turn to the relevant statutory provisions to see whether that is so. I shall take those contained in the Act of 1918 and omit later amendments because they cannot have been intended to alter and, in my view, do not alter the general conception of "a trade." I do not find any assistance in any provisions beyond Schedule D, and I shall refer as shortly as I can to those provisions in Schedule D and its rules which have some relevance. Schedule D provides that tax shall be charged in respect of profits arising or accruing to any person from any trade, profession, employment or vocation carried on in the United Kingdom or elsewhere (paragraph 1 (*a*) (ii)) or exercised within the United Kingdom (paragraph 1 (*a*) (iii)): and that tax shall be charged under Case I in respect of any trade not contained in any other Schedule. The rule applicable to Case I provides for computation of tax on an average of the profits of the preceding three years. The rule applicable to Case II makes similar provisions with regard to professions, employments and vocations.

In the rules applicable to Cases I and II there are several which deal with setting up a trade, discontinuance of a trade or succession to a trade. Rule 8 (1) begins: "Where a person "charged or chargeable with tax in respect of any trade, pro"fession or vocation which has been set up or commenced "within the period of three years . . ." (not "which has been "set up or commenced by him"), and rule 8 (2) provides: "Where a trade, profession, or vocation is discontinued in any "year, any person charged or chargeable with tax in respect "thereof, shall be entitled" to certain relief. Rule 9 begins: "If a person charged under this Schedule ceases within the year "of assessment to carry on the trade, profession, or vocation in "respect of which the assessment is made, and is succeeded "therein by another person" and then makes provision for adjusting the assessment by charging the successor with a fair proportion thereof and relieving the person originally charged of a like amount. Rule 11 provides: "If within the year of assess"ment or the period of average upon which the assessment is to "be based a change occurs in a partnership of persons engaged "in any trade or profession, by reason of death, or of dissolution "of the partnership as to all or any of the partners, or by the "admission of a new partner, or if any person succeeds to a trade "or profession, the tax payable in respect of the partnership, or "any of the partners, or of the person so succeeding shall be "computed according to the profits or gains of the trade or profession during the respective periods prescribed by this Act, "notwithstanding the change or succession, unless the partners "or the person succeeding to the trade or profession prove . . ." a certain ground of relief.

Accordingly the Act contemplates that when a trader ceases to carry on his trade one or other of two things may happen. Either the trade may be discontinued or that trader may be succeeded in the trade by another: and a change in a partnership of persons engaged in a trade is treated in the same way as a succession. To that extent at least the Act treats the trade as something which may persist notwithstanding that one trader has been replaced by another.

The word "trade" appears to me to be used in the same sense in rule 3. That rule begins: "In computing the amount "of the profits or gains to be charged, no sum shall be deducted "in respect of . . ." A trader is taxed only in respect of the profits of his own trading and not in respect of the profits of the trading of his predecessor or successor in his trade, and so it might seem that "trade" in this rule should mean his own trade and nothing more. But the trader is not taxed on his actual profits in the year of assessment. The Act of 1918 contains rules for an artificial computation of profits for the year of assessment which might bring in to the computation receipts and expenses of his predecessor if he had recently succeeded to the trade, and in such a case rule 3 must apply to all expenditure which is being brought into the computation whether or not it was incurred by the person who is being assessed. Moreover, it is not difficult to suppose a case where a trader is shortly to be succeeded in his trade by another person and where he spends money the benefit of which will accrue in whole or in part to his successor. It could not be said that for that reason the money was not wholly and exclusively laid out for the purposes of the trade.

But does that mean that expenditure by a trader to protect his own business is deductible if his assets are to be taken from him and vested in some other body to be used in carrying on the same or a similar trade in future? This is a question which could not arise in any ordinary case. In all other cases a trader who is protecting his business is doing so both in the interests of himself and of possible successors (if he considers them at all): but it is said that the respondents were not protecting their business but only their ownership of it because there was no threat to discontinue their business. That argument appears to me to depend on an assumption that " the trade " of the respondents would not have been discontinued and that the new body which was to carry on the industry would have been their successors in their trade. The recent decision of this House in *Inland Revenue Commissioners* v. *Barr*,[61] by approving the actual decision in *Inland Revenue Commissioners* v. *West*,[62] though not the grounds of judgment, shows that " the trade " of a particular trader may be discontinued although his trading assets are to be used in the same industry by the person who acquires them: that fact by itself is not sufficient to establish that the person acquiring the assets is the successor of the former trader. This may be a technical distinction, but the argument for the appellant is a technical argument. Once it is decided that in the ordinary case expenditure incurred by a trader in defending his business is a permissible deduction, it can only fail to be a permissible deduction in this case by reason of the technical meaning of " the trade " in rule 3. But the Solicitor-General assumed rather than argued that any statutory body in which the respondents' assets were vested would have become the successors of the respondents in the income tax sense. In my view, it is by no means certain, and perhaps not even probable, that that would have happened. It is true that when a business is acquired by agreement, as in *Bell* v. *National Provincial Bank of England Ld.*,[63] the purchaser may become the successor in the income tax sense although he merges its accounts and profits with those of his own business: he has acquired the whole business, including the goodwill, for the purpose of carrying it on, and whether he carries it on in isolation or in conjunction with his own business is a matter for his decision. It is independent of the acquisition of the business and may be immaterial. But it does not appear to me to follow that if the sugar refining assets of all the firms in the industry had been vested by statute in a body directed to carry on the industry in accordance with provisions in the statute that body would necessarily have

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[61] [1954] 1 W.L.R. 792.

[62] 1950 S.C. 516; 31 T.C. 402.

[63] [1904] 1 K.B. 149; 20 T.L.R. 97.

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become the successor of all those firms in the income tax sense so that "the trade" of each of them would continue: and I find nothing in the case stated to indicate that that would have happened or that the respondents' directors or shareholders had any views about that matter. On nationalization the respondents' trade might or might not have been discontinued in the income tax sense. That would depend on the terms of the statute. But, as I have said, the argument of the appellant is based on the assumption that the respondents' trade would not have been discontinued. Of course the industry would not have been discontinued, but that is quite a different matter.

The respondents' expenditure was wholly and exclusively laid out to prevent their business and assets being taken from them, and I do not think that it is a sufficient answer to say that their trade might not have been discontinued after nationalization even if it were an answer to say that it would not have been discontinued. If the future fate of their trade was indeterminate it cannot be said that the only matter in question was who should own that trade, and that its continued existence was not in question.

A general test is whether the money was spent by the person assessed in his capacity of trader or in some other capacity—whether, on the one hand, the expenditure was really incidental to the trade itself or, on the other hand, it was mainly incidental to some other vocation or was made by the trader in some other capacity than that of trader. It is said that the appellant can succeed in this case on an application of that test because a distinction must be recognized between a person as trader and the same person as owner of his trade. I find that distinction difficult to understand. Whatever may be meant by referring to the trade as an "entity," until there is a change of ownership of the trade the trade only exists because it is being carried on by the trader and the trader is only owner of the trade because he is carrying it on. I do not see how a person can be owner of the trade unless he is also the trader or how he can be the trader unless he is also the owner of the trade. It therefore appears to me that there is no real distinction between a person in his capacity of trader and that person in his capacity of owner of the trade, and that if the appellant is to succeed it must be because the terms of the rule require, in the special circumstances of this case, some modification of the test generally applicable. I see no sufficient reason for so holding.

It is not very satisfactory to decide this case on these somewhat narrow grounds. But in this case the terms of a statute have to be applied to circumstances far removed from anything that can have been in contemplation when the statute was passed, and therefore it is not surprising if there is no satisfactory or clear-cut solution. Not without some hesitation I have come to be of opinion that the decision of the Court of Appeal should be affirmed.

LORD TUCKER. My Lords, in my view the decision in this case ultimately depends upon the meaning of the words " the trade " in rule 3 (*a*) of the rules applicable to Cases I and II of Schedule D to the Income Tax Act, 1918. Do these words refer to the particular trader—X—carrying on a particular trade at the material time, or do they refer to the trade as distinct from the trader? Is expenditure directed, not to enabling the trade to produce profits, but to ensure that its assets and goodwill from which its profits are derived shall be retained by X to the exclusion of Y, a permissible deduction? It is, of course, true that it is the trader who is being taxed, but his tax is computed on the profits or gains arising or accruing from his trade. My Lords, in their language paragraphs 1 and 2 of Schedule D, rule 1 of the rules applicable to Case I, rule 3 of the rules applicable to Cases I and II and the old rules 8, 9 and 11 all, I think, point to the conclusion that " the trade " is regarded as an entity for tax purposes distinct from the persons who may be carrying it on at a particular moment. Your Lordships had recently to consider this question in connexion with a balancing charge under section 17 (1) of the Income Tax Act, 1945, in the case of *Inland Revenue Commissioners* v. *Barr*.[64] The actual decision of that case has, of course, no bearing on the present appeal, but it shows that in cases of discontinuance of and succession to a trade the Income Tax Acts regard the trade as distinct from the trader. Perhaps the clearest and most relevant example for present purposes is to be found in the fact that when the profits of the trade were computed on the average of the preceding three years, and the trade had changed hands during those years, the profits from that trade continued to be calculated without regard to the change.

If this is the true meaning of the words " the trade " in rule 3 (*a*) it would appear to me to follow as a matter of law that there was no evidence before the commissioners to justify a finding that the sum in question was money wholly and exclusively laid out for the purposes of the trade. In fact it is to be observed that their actual finding is that it was laid out for the purposes "of "the company's trade." If by the use of these words they meant —as I think they must—that the expenditure was for the purpose of retaining the trade in the hands of the company, then I think they have misinterpreted the language of the rule.

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[64] [1954] 1 W.L.R. 792.

Although this rule has been the subject of discussion in numerous cases before your Lordships' House and elsewhere, most of which have been exhaustively examined and analysed in the judgments in the Court of Appeal, this particular point has never arisen before. Consequently I can derive little assistance from authority.

In the course of his dissenting judgment Singleton L.J. said [65]: "Expense incurred in maintaining the properties or assets of the "company in a state to earn profits for the business, and expense "incurred in protecting the assets against thieves or marauders "are properly deductible in arriving at the balance of profits or "gains, and so, too, may be the cost of insurance of the premises "owned. A different element creeps in when the expense is "incurred for the purpose of opposing nationalization of an "industry or of a particular undertaking. Nothing in the nature "of destruction of the assets of the undertaking is involved, nor "is there a proposal to render the undertaking, or the industry, "less profit bearing, whatever the result might be. It is natural "to assume that if the Government took control of an undertaking "it would be their desire to increase rather than to diminish its "efficiency and profit-earning capabilities."

My Lords, it is the presence of this fresh element, which the learned Lord Justice refers to as having "crept in," which deprives me of the benefit which I should otherwise have derived from a study of existing authorities. When Lord Davey in *Strong & Co. of Romsey Ld.* v. *Woodifield* [66] said, "These words are "used in other rules, and appear to me to mean for the purpose "of enabling a person to carry on and earn profits in the trade, "etc. I think the disbursements permitted are such as are made "for that purpose. It is not enough that the disbursement is "made in the course of, or arises out of, or is connected with, the "trade, or is made out of the profits of the trade. It must be "made for the purpose of earning the profits," he was not considering the question whether any distinction was to be drawn between the trade and the particular trader carrying on that trade.

[65] [1953] Ch. 601, 622.

[66] [1906] A.C. 448, 453.

When he spoke of "a person" he was not referring to A as distinct from B. Every business must be carried on by a person or persons who of necessity must have incurred the expenditure in question, but to use the language of Lord Davey to support the proposition that expenditure directed solely to securing that the trade shall in future be carried on by A rather than B is "money "wholly and exclusively laid out or expended for the purposes of "the trade" seems to me wholly unwarranted. These words of Lord Davey have often been quoted with approval, but never in any context involving consideration of the fresh element which has given rise to the present case.

It is on this aspect of the case alone that, with great diffidence, I find myself unable to agree with the conclusion arrived at by Jenkins and Hodson L.JJ. Jenkins L.J. examined the authorities and set out the conclusions he derived from them.[67] I do not question these conclusions except in so far as they are expressed in language which is coloured by the interpretation he has throughout placed upon the words of Lord Davey.

In *Union Cold Storage Co. Ld.* v. *Jones*, Rowlatt J. said [68]: "That is not bringing grist to their mill or bringing customers to "their door." Having quoted this passage,[69] Jenkins L.J. later refers to this passage again [70] as "bringing grist to the mill." It is upon this distinction between *the* mill and *their* mill that, in my opinion, this case turns. Rowlatt J. was not attempting to draw any such distinction because it did not arise, but in my view expenditure to increase the profit earning capacity of a mill is something altogether different from expenditure to secure that A rather than B shall continue to own and manage the mill and enjoy the resulting profits. The former, unless of a capital nature, is clearly a permissible deduction under rule 3 (*a*), whereas in my view the latter is not.

I do not consider that the decision in *Southern* v. *Borax Consolidated Ld.*[71] in any way conflicts with this view. The loss or destruction of one asset is of course a detriment both to the trader and the trade. Similarly the destruction of all the assets is still more detrimental. But, although the transfer from A to B of all the assets intact together with the goodwill may be highly detrimental to A, it does not follow that it will have any adverse effect on the trade which comprises those assets and goodwill.

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[67] [1953] Ch. 601, 637.

[68] (1923) 8 T.C. 725, 736.

[69] [1953] Ch. 601, 632.

[70] Ibid. 637.

[71] [1941] 1 K.B. 111.

I have reached this conclusion without reference to the Privy Council decision in *Ward & Co. Ld.* v. *Commissioner of Taxes* [72] because, although the facts there more nearly resemble those in the present case than in any other which was cited, the language of the New Zealand statute is not identical with that of the rule now in question, and because Viscount Cave, delivering the judgment of the Board, expressly stated that decisions on the English Income Tax Acts had no bearing on the question then under discussion. In these circumstances it does not seem profitable to examine the precise difference in the language of the relevant legislation or to speculate as to what the decision might or might not have been in different circumstances.

My Lords, I conceive that if this be the true construction of the rule, cases may still arise where the evidence shows that the change of ownership will or may bring about the extinction of the trade previously carried on and the expenditure is incurred to prevent this result. In the present case there is no such finding, nor is there any trace of any such issue having been canvassed before the commissioners or in the courts below, nor do I think that there is sufficient material to justify your Lordships in drawing any inferences with regard to such risk.

For these reasons I would allow the appeal.

LORD KEITH OF AVONHOLM. My Lords, the Commissioners for the General Purposes of the Income Tax have found that the sum involved in this appeal was money wholly and exclusively laid out for the purposes of the respondent company's trade and was an admissible deduction from its profits for income tax purposes. In so finding the commissioners have done little more than echo the words of the statute. Rule 3 (*a*) of the rules applicable to Cases I and II of Schedule D says: " In computing the amount " of the profits or gains to be charged, no sum shall be deducted " in respect of (*a*) any disbursements or expenses, not being " money wholly and exclusively laid out or expended for the " purposes of the trade. . . ." Even if the precise object to which the money has been devoted is not in doubt, it may not always be easy to say whether it is a deductible expenditure in law, but at any rate the starting point of the problem is clearly defined. As the argument in this case developed it seemed to me that part of the difficulty in the case lay in a certain ambiguity in the facts found. There is no finding in fact of the particular objective of the company's expenditure and it is possible, I think, to say that a number of objectives or combination of objectives could be deduced from the facts found by the commissioners. This matter calls perhaps for a little elaboration.

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[72] [1923] A.C. 145.

It is agreed that the expenditure in question was incurred in a campaign against the nationalization of the sugar refining industry in general and of the business of the respondent company in particular. It is conceded that nothing turns on the wider aspect of the campaign and that the case must be looked at as if conducted solely in the interests of the company. It is found in the case that nationalization could take two forms—acquisition of the business concerned in return for compensation, or compulsory transfer of the shares or stock of the company concerned to nominees of the Treasury or a public body. It was conceded by Mr. Tucker for the respondents that if the campaign were directed wholly or partly against the latter form of nationalization he would have no case, for the reason, as I understood, that the company would continue to exist and carry on its business, albeit under Government control, and that the battle would be a battle on behalf of the existing shareholders and not on behalf of the company. I confess to finding this distinction somewhat unreal in substance as it seems to me immaterial whether the business of a company is carried on, for better or for worse, by a Government which has acquired the assets and business of the company or a Government which has acquired all the shares of the company and carries on the business of the company as sole shareholder. It is just here that the findings of the commissioners seem to me to be deficient, because they do not find whether the expenditure was incurred exclusively to resist nationalization by way of acquisition of business and assets or to resist control by either form of nationalization. It was maintained, however, that the findings may be held to support the view, however unrealistic it may be, that the expenditure was primarily to prevent the company—with emphasis on the company—from losing its business and assets. I am not prepared to say that this is not a supportable view of the facts, and if so it leads to the question whether the commissioners were entitled to hold that in law the expenditure was made for the purposes of the company's trade. It is on that view that I propose to examine the case, with reference to the statute and the authorities.

It is necessary, in my opinion, to distinguish between a threat to the assets of a business and a threat to the right of the owner of the business and assets to carry on the business. The assets of a business may be threatened in a variety of ways. They may be said to be under a constant threat of loss by fire, or burglary, or peril of the sea, or other risk varying with the nature of the business or asset; or they may come under a more direct threat by challenge of the right to use or employ them in the business. Such threats leave the question of ownership of the business unaffected. The owner of the assets may be able to continue in business and preserve the goodwill even if the threat is realized. On the other hand, it may be that the loss of the asset or assets will so cripple him as to put him out of business. But he is free to carry on his business if he can make good, or afford to ignore, his loss. What result will follow will depend on circumstances varying with each individual case and personal to the owner concerned. Where the threat is to the ownership of the business the position is different. If the threat matures and is successful the owner, or reputed owner, is put out of business and there can be no question of his continuing the business with a view to profit, though his challenger may do so. Apart from nationalization, such a situation could arise where a person starts a business or profession in breach of a restrictive trade covenant, or where some question of partnership, or succession, or other challenge of title to ownership of the business has arisen. There is a plain difference between these two cases. Where loss of or damage to an asset results there is loss or damage to the trade, as such: Where loss of ownership results there is no necessary loss or damage to the trade at all. The trade may go on as before in the hands of the successful challenger with the old assets or may for a variety of possible reasons come to an end. Income tax legislation has at different times made different provisions for cases of discontinuance of a trade or succession to a trade. These are no doubt provisions relating to the manner or measure of assessment, but as they are a clear recognition of the common commercial experience of a business continuing through several hands, they indicate that " the trade," when used in the statutes, is to be construed as an entity in itself. In the present case the form of nationalization postulated involved the continued carrying on of the trade, with the assets and business acquired, under public ownership and control.

In its shortest form this appeal raises the question whether expenditure designed to retain the ownership and control of a business is expenditure laid out for the purposes of the trade within the meaning of rule 3 (*a*). Counsel for the respondents agreed that this is the question. As he put it, the expenditure was to determine who was going to carry on the trade. And, he submitted: " It was not the trade as an entity that was to be " looked at but the person who was carrying on the trade." For this view reliance was placed on a passage in the speech of Lord Davey in *Strong & Co. of Romsey Ld.* v. *Woodifield.*[73] Referring to the words " for the purposes of the trade " Lord Davey said: " These words are used in other rules, and appear to me to mean " for the purpose of enabling a person to carry on and earn profits " in the trade, etc. I think the disbursements permitted are " such as are made for that purpose. It is not enough that the " disbursement is made in the course of, or arises out of, or is " connected with, the trade, or is made out of the profits of the " trade. It must be made for the purpose of earning the profits." I am unable to attach any special significance to the words " for " the purpose of enabling a person to carry on and earn profits in " the trade." There must always be some person carrying on a trade and earning, or trying to earn, profits in it and necessarily making some expenditure. The question remains whether the expenditure was for the purposes of the trade. In the case of *Strong & Co.*[74] it was held that the expenditure incurred was not for the purposes of the trade. No question arose or could have arisen as to whether the expenditure was necessary to enable the trader to keep the business for himself and Lord Davey, in my opinion, had no such case in his mind. It is impossible, in dealing with income tax legislation, to avoid referring from time to time to " the person carrying on the trade," or " the trader," or " the " taxpayer," but that is no reason for taking the language used out of its context. What Lord Davey's statement has repeatedly been taken as meaning is that expenditure for the purposes of the trade must be expenditure for the purpose of earning profits in the trade. In that sense it has been applied over and over again as a sound exposition of the meaning of the statutory language. I need go no further than refer to the two recent decisions of this House in *Smith's Potato Estates Ld.* v. *Bolland*[75] and *Inland Revenue Commissioners* v. *Dowdall, O'Mahoney & Co. Ld.*[76]

That expenditure by a person, whether a company or individual, for the purpose of earning profits in the trade is not the same thing as expenditure for the purpose of keeping the profits earned by a trade for himself would seem very clear if one considers the case of a person who wishes to acquire a trade, or the profits of a trade, for himself. It would be abuse of language to say that expenditure by such a person for such a purpose was expenditure for the purposes of the trade even if the desired result was achieved. Does it become any more expenditure for the purposes of the trade by the fact that it is made by a person already in the trade for the purpose of keeping the other person out of the trade? I cannot think that that is so, or that Lord Davey ever thought of it being so.

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[73] [1906] A.C. 448, 453.
[74] [1906] A.C. 448.
[75] [1948] A.C. 508.
[76] [1952] A.C. 401.

It has frequently been pointed out that when a trader claims to deduct expenditure as made for the purposes of the trade it is material to consider the capacity in which he has made the expenditure. So expenditure has been disallowed as a deduction where made by a person not as trader but as taxpayer (*Inland Revenue Commissioners* v. *Dowdall, O'Mahoney & Co. Ld.*[76]; *Smith's Potato Estates Ld.* v. *Bolland*[77]; *Rushden Heel Co. Ld.* v. *Keene*[78]), or as property owner or householder (*Strong & Co. of Romsey Ld.* v. *Woodifield*[79]; *Union Cold Storage Co. Ld.* v. *Jones*[80]), or as law-breaker (*Inland Revenue Commissioners* v. *Warnes & Co. Ld.*[81]; *Inland Revenue Commissioners* v. *Alexander Von Glehn & Co. Ld.*[82]). Here I would say that the expenditure was made by the company not as trader, but as owner of the trade, and from purely personal considerations not connected with the purposes of the trade.

Expenditure to be deductible before profits for the purpose of income tax are struck must, in my opinion, be related to, or affect, the profit earning capacity of the trade. That is not necessarily conclusive, for capital expenditure cannot be deducted. But it is, I think, a minimum requirement. In all the cases in which the question has been considered and in which expenditure of a revenue character has been allowed or disallowed as a deduction it will, I think, be found that this test is satisfied, though there may be some narrow cases like *Smith's Potato Estates Ld.* v. *Bolland*[83] in which there was a difference of opinion as to the side of the line on which the case fell. If the purpose of the expenditure is to benefit the trade it is not necessary to show by demonstration that in fact the expenditure has produced, or will produce, profit or has prevented loss of profit or has facilitated or will facilitate the earning of profit. But it must, in my opinion, be laid out for that purpose and with that expectation. In the present instance I am unable to see any ground for thinking that the expenditure in question will benefit the trade of the company by one penny, though I see that it might benefit the company by securing that it will continue to enjoy the profits earned by the trade. On this latter count I should say that this was a typical case of the application of profits earned and not of expenditure to earn profits.

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[76] [1952] A.C. 401.
[77] [1948] A.C. 508.
[78] [1948] W.N. 283; [1948] 2 All E.R. 378; 30 T.C. 298.
[79] [1906] A.C. 448.
[80] 8 T.C. 725.
[81] [1919] 2 K.B. 444.
[82] [1920] 2 K.B. 553; 36 T.L.R. 463.
[83] [1948] A.C. 508.

As the cases cited in debate are, in my opinion, all illustrations of the application of the principles which I have endeavoured to set out, I refrain from examining them in detail. I would, however, say a word or two about a few of them which were much pressed in the argument for the respondents.

In *Usher's Wiltshire Brewery Ld.* v. *Bruce* [84] the question was whether a brewery company which owned or held on lease a number of tied houses was entitled to treat as deductible, in arriving at their brewery profits, expenses incurred in connexion with these tied houses in the shape of repairs, abatements of rent, fire and licence insurance premiums, rates and taxes and legal and other costs. As it was found that the tied houses had been acquired to promote the profits of the company's brewery trade it was held that the expenses were incurred for the purpose of earning the profits. The specialty of the case was that the houses in question were occupied by tenants of the brewery company who were carrying on their own trade therein as publicans, but once it is appreciated that these houses were held to be really trading assets of the brewery business there seems to me to be no material difference between the tied houses and any other trading assets of the brewery company. Expenses put out to protect these assets would be in no different position from expenses put out to protect any trading assets, for example, insurance premiums on the stock in trade of a business. The material point in that case was that the brewery company had acquired the tied houses for the purposes of its trade.

In *British Insulated & Helsby Cables Ld.* v. *Atherton* [85] a company had established a pension fund for its clerical and technical salaried staff and made an initial payment of £31,784 to form the nucleus of the fund. This House held that this was an expenditure wholly and exclusively laid out or expended for the purposes of the company's trade, but disallowed the deduction as being a payment in the nature of capital expenditure. On the first point Viscount Cave L.C. said [86]: "It was made clear in the "above cited cases of *Usher's Wiltshire Brewery Ld.* v. *Bruce* [87] "and *Smith* v. *Incorporated Council of Law Reporting for* "*England and Wales* [88] that a sum of money expended, not of "necessity and with a view to a direct and immediate benefit to "the trade, but voluntarily and on the grounds of commercial "expediency, and in order indirectly to facilitate the carrying on "of the business, may yet be expended wholly and exclusively "for the purposes of the trade." It is clear, in my opinion, that what Lord Cave had in mind with reference to *Usher's* case [89] was the indirect benefit resulting to the trade from the acquisition of the tied houses and the expenditure put out upon or in connexion with them by the brewery company. The context of Lord Cave's observation is of some importance when one comes to consider what he said three years earlier in the case of *Ward & Co. Ld.* v. *Commissioner of Taxes.*[90]

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[84] [1915] A.C. 433.

[85] [1926] A.C. 205.

A case not dissimilar to *Usher's* case [91] in respect of the indirect nature of the expenditure incurred is *Southern* v. *Borax Consolidated Ld.*[92] The company in that case had acquired certain land in California of which a subsidiary company was put into possession for the purpose of its business. The whole of the capital of this subsidiary company was held by the parent company and it was agreed that the business of the subsidiary company should be treated as if it were a branch of the parent company's business. The title of the company's land in California was challenged by the City of Los Angeles and the company expended a sum of over £6,000 in the litigation that ensued. It was held by Lawrence J. (as he then was) that the expenditure was wholly and exclusively laid out for the purposes of the company's trade and was not capital expenditure. It was therefore a deductible expense. In the circumstances of that case I see no reason to differ from the first branch of that decision. The land was just a trading asset of the company on the use of which it relied for making profits, and expenditure incurred in protecting that asset could in law be properly regarded as expenditure made for the purposes of the trade. I see no reason why a similar conclusion could not be reached where a trading company or syndicate had only one asset, say a mine or piece of land, and was put to expense in defending its title to that asset, though it might depend on circumstances whether the expenditure fell to be treated as capital or revenue expenditure.

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[86] [1926] A.C. 205, 211–2.
[87] [1915] A.C. 433.
[88] [1914] 3 K.B. 674.
[89] [1915] A.C. 433.
[90] [1923] A.C. 145.
[91] [1915] A.C. 433.
[92] [1941] 1 K.B. 111.

The last case I would refer to in detail is *Ward & Co. Ld.* v. *Commissioner of Taxes*.[93] The expense there was expense incurred by a brewery company in New Zealand with a view to defeating a proposal for the prohibition of the sale of intoxicating liquors throughout New Zealand to be voted on by a special poll of the parliamentary electors. If carried, this proposal would have meant the destruction of the company's business. The company would no doubt be left in possession of its assets but as they could not be employed for brewing beer for sale in New Zealand it was really the business that was threatened with destruction. The language of the statute in New Zealand was somewhat different from that of rule 3 (*a*) in this country. What was prohibited as a deduction was expenditure " not exclusively " incurred in the production of the assessable income." I quote one short passage from the judgment of the Court of Appeal in New Zealand in rejecting the claim of the taxpayer[94]: " We find " it quite impossible to hold that the expenditure was incurred " exclusively, or at all, in the production of the assessable income. " It was incurred not for the production of income but for the " purpose of preventing the extinction of the business from " which the income was derived, which is quite a different thing." On appeal to the Privy Council this judgment was affirmed. Viscount Cave L.C., who delivered the judgment of the Board, said[95]: " The expenditure in question was not necessary for " the production of profit, nor was it in fact incurred for that " purpose. It was a voluntary expense incurred with a view to " influencing public opinion against taking a step which would " have depreciated and partly destroyed the profit-bearing thing. " The expense may have been wisely undertaken, and may " properly find a place, either in the balance sheet or in the " profit and loss account of the appellants; but this is not enough " to take it out of the prohibition in section 86 (1) (*a*) of the " Act. For that purpose it must have been incurred for the " direct purpose of producing profits." That case is not, of course, binding on this House and was decided under a different statute, to which the decisions under the Income Tax Acts in this country are not applicable, as Lord Cave pointed out. But I find the reasoning convincing and no less capable of application to the present case. Some stress was laid on the reference by Lord Cave to the words "for the direct purpose of producing profits" as contrasted with the words "indirectly to facilitate the carrying "on of the business" used by him three years later in the *British Insulated & Helsby Cables* case[96] in the passage which I have already quoted. The case of *Ward*[97] was not before this House in the later case and it is pure surmise that Lord Cave had any distinction in his own mind in the language used in the later case. An expenditure may be for the direct purpose of producing profit though the means of achieving that purpose are indirect. *Usher's* case,[98] which Lord Cave cited in the passage in question in his speech in the *British Insulated & Helsby Cables* case,[99] was a typical illustration of producing profits by indirect means. We were referred to an Australian case of *W. Nevill & Co. Ld.* v. *Federal Commissioner of Taxation*,[100] in which the High Court of Australia held that a sum paid to a managing director to secure his resignation was a loss or outgoing incurred in gaining or producing assessable income, language nearly identical with that in the New Zealand case of *Ward*.[101] In that case, *Ward's* case,[101] *British Insulated & Helsby Cables Ld.* v. *Atherton*[102] and *Mitchell* v. *B. W. Noble Ld.*[103] were all before the court and a perusal of the judgments in that case satisfies me that in determining what is an expenditure to produce assessable income the Australian court proceeded on the same principles and reached the same result as would have been recognized and reached by an English court deciding what was an expense laid out for the purposes of the trade.

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[93] [1923] A.C. 145.

[94] [1921] N.Z.L.R. 934, 939.

[95] [1923] A.C. 145, 149–50.

It was sought to attach some importance to evidence of the auditor of the company that the sum in question here was, in accordance with ordinary commercial accountancy, charged against the profit to which it related. That may have some relevance to the question whether expenditure is capital expenditure or revenue expenditure, but as has been repeatedly pointed out in this House and elsewhere it is in no way conclusive on the question whether it is a proper deduction in assessing profits liable to tax. This was very clearly pointed out by Warrington L.J. in *Inland Revenue Commissioners* v. *Alexander Von Glehn & Co. Ld.*[104]

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[96] [1926] A.C. 205, 212.
[97] [1923] A.C. 145.
[98] [1915] A.C. 433.
[99] [1926] A.C. 205.
[100] 56 C.L.R. 290.
[101] [1923] A.C. 145.
[102] [1926] A.C. 205.
[103] [1927] 1 K.B. 719.
[104] [1920] 2 K.B. 553, 567.

There does not appear to me to be any difficulty in ascertaining the principles to be applied here as illustrated in the decided cases, nor do I think that there is much difficulty in applying these principles to this case. The judges of the majority of the Court of Appeal were, I think, only able to reach the conclusion which they did by holding that expenditure to help the trader to keep the profits of the trade for himself is expenditure for the purposes of the trade. I know of no decision which has gone that length, and for the reasons I have endeavoured to state such a result cannot follow on a sound construction of the statute.

I would allow the appeal.

Appeal dismissed.

Solicitors: *Solicitor of Inland Revenue; Pennefather & Co.*

J. C.*
1954
Oct. 7.

JUAN YSMAEL & COMPANY INCORPORATED . . . APPELLANTS;

AND

GOVERNMENT OF THE REPUBLIC OF INDONESIA . . . . RESPONDENTS.

[AND CONNECTED APPEAL.]

ON APPEAL FROM THE APPEAL COURT OF HONG KONG.

Conflict of Laws—Sovereign immunity—Foreign State not a party to proceedings—Alleged interest in property in suit—Necessity for proof that claim not illusory or founded on defective title—Action to be stayed at point when it is established that conflicting rights have to be decided—Action in rem for possession of ship—Claim by Indonesian government to own it.

A foreign government claiming that its interest in property will be affected by the judgment in an action to which it is not a party and in which it alleges that it is indirectly impleaded, is not bound as a condition of obtaining immunity to prove its title to the interest claimed, but it must produce evidence to satisfy the court that its claim is not merely illusory, nor founded on a title manifestly defective. The court must be satisfied that conflicting rights have to be decided in relation to the foreign government's claim. When the court reaches that point it must decline to decide the rights and must stay the action, but it ought not to stay the action before that point is reached.

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* *Present*: EARL JOWITT, LORD PORTER, LORD OAKSEY, SIR JOHN BEAUMONT, and MR. L. M. D. DE SILVA.

The view of Scrutton L.J. in *The Jupiter* [1924] P. 236; 40 T.L.R. 815 that a mere assertion of a claim by a foreign government to property the subject of an action compels the court to stay the action and decline jurisdiction is against the weight of authority and cannot be supported in principle.

Compania Naviera Vascongado v. *S.S. Cristina* [1938] A.C. 485; 54 T.L.R. 512; [1938] 1 All E.R. 719, *United States of America and Republic of France* v. *Dollfus Mieg et Cie. S.A. and Bank of England* [1952] A.C. 582; [1952] 1 T.L.R. 541; [1952] 1 All E.R. 572; *Haile Selassie* v. *Cable and Wireless Ld.* [1938] Ch. 839; 54 T.L.R. 996; [1938] 3 All E.R. 384, and *The Arantzazu Mendi* [1939] P. 37; 55 T.L.R. 71; [1938] 4 All E.R. 267; [1939] A.C. 256; 55 T.L.R. 454; [1939] 1 All E.R. 719 considered.

Where, therefore, on an action in rem by the appellant company against a steamship of which they claimed possession as owners, a foreign government, (to whom the vessel had been chartered by the appellants and used for carrying troops,) alleging that they had bought the vessel through an agent of the appellants and were the owners of it, sought to have the writ and all subsequent proceedings set aside on the ground that the writ impleaded a foreign sovereign State, and the evidence established that the appellant's agent had no authority to sell the ship on the terms specified in the agreement of sale and that the agent acting for the foreign government was fully aware of that fact, the title of the foreign government to the ship (legal possession of which had admittedly never passed to them) was manifestly defective and they had not established that they possessed such an interest in the vessel as would show that they were impleaded, and there was accordingly no ground for setting the writ aside.

Judgment of the Appeal Court of Hong Kong reversed.

CONSOLIDATED APPEALS (Nos. 45 and 46 of 1953) from a judgment of the Appeal Court of Hong Kong (December 13, 1952) reversing a judgment of Reece J. in the Supreme Court of Hong Kong (Admiralty Jurisdiction) (September 15, 1952) and setting aside the writs and all subsequent proceedings in two actions, namely, action No. 6 and action No. 8 in the Supreme Court of Hong Kong (Admiralty Jurisdiction). Action No. 6 was an action brought against the steamship *Tasikmalaja* by the respondent Anthony Loh for ship's necessaries. It was conceded in argument that that action could be ignored, and the judgment in the present appeal was therefore confined to action No. 8.

The appellants, who were a company incorporated under the laws of the Philippine Islands, issued the writ in the action on June 27, 1952. It was a writ in rem against the steamship *Tasikmalaja* addressed to all parties interested in the said steamship, and by the statement of claim endorsed thereon the plaintiffs as the owners of the said steamship claimed to have legal possession of the vessel decreed to them.

On June 27, 1952, the vessel was arrested by process of the court in the action, and at all material times thereafter remained in the legal custody of the head bailiff of the Supreme Court. On June 30, 1952, an appearance under protest was entered by the Government of Indonesia without prejudice to an application to dismiss the action. On July 9, 1952, the Government of Indonesia gave notice of motion for an order that the writ and all subsequent proceedings be set aside on the grounds that the writ impleaded a foreign sovereign State and that the Government of Indonesia was the owner of the vessel by buying it from an agent of the appellant company, one Starr, or was in possession or control or entitled to possession of the vessel. Affidavits were sworn in support of the motion by various persons, including in particular Kwee Djie Hoo, described as Consul General for the Government of Indonesia at Hong Kong, and Pamoe Rahardjo, described as a Major in the Army of the Republic of Indonesia. On July 25, 1952, the appellants gave notice of their intention to cross-examine those deponents, and applied for leave to do so, and on August 25 Reece J. granted such leave. Thereupon the Government of Indonesia claimed diplomatic privilege for the deponents, but on August 27 Reece J. ruled that the deponents were not entitled to diplomatic privilege. Summonses were accordingly issued to the dependents to attend for cross-examination, which they failed to do, and on September 15, 1952, Reece J. ordered the affidavits of the two deponents to be removed from the file. There was no appeal before the Judicial Committee against the orders of the judge overruling the claim to diplomatic privilege, and directing the two affidavits to be removed from the file, and the Board expressed no opinion on the propriety of such orders.

On September 15, 1952, Reece J. gave judgment dismissing the motion of the Government of Indonesia claiming immunity from being sued, and on the same day that Government gave notice of appeal from the said order to the Appeal Court. On October 24, 1952, the action came to trial before Reece J., who decreed possession of the vessel to the appellants subject to the claim of the Hong Kong & Whampoa Dock Co. Ld. for the cost of work done on the vessel. On December 8, the appeal of the Government of Indonesia against the order of Reece J. of September 15, 1952, refusing immunity, came before the Appeal Court. The three following submissions were made to the Appeal Court by counsel on behalf of the Indonesian Government: (i) That the trial judge erred in making the orders for the cross-examination of Mr. Kwee Djie Hoo and Major Pamoe Rahardjo; (ii) that the trial judge erred in refusing to grant to those persons the diplomatic immunity claimed for them; (iii) that even if the trial judge was correct in his decisions on points (i) and (ii), there was left upon the record ample material upon which the impleading motions should have been allowed.

The Appeal Court (Howe P. and Williams J.) decided to hear the third point first, as a decision on that point would render it unnecessary to determine points (i) and (ii). The court came to the conclusion that on the material before them the impleading motions should have been allowed. They pronounced no decision on points (i) and (ii). Accordingly the judgment of the court rescinded the judgment of Reece J. of September 15, 1952, ordered that the writ and all subsequent proceedings and orders in the said action be set aside on the ground that the said action impleaded the Government of Indonesia, a foreign sovereign State, declared that the judgment of Reece J. dated October 24, 1952, was null and void for want of jurisdiction and ordered the appellants to pay the costs of the Government of Indonesia of the said appeal and the said notice of motion. The question before the Board was whether that judgment was right.

1954. April 5, 6, 7, 8, 12, 13; May 26. *Lord Hailsham Q.C.* and *R. O. Wilberforce Q.C.* for the appellants. The sole question is whether the plea for immunity on the ground of impleading is well or ill founded in the circumstances of this case. For practical purposes it will simplify matters if the argument is confined to action No. 8—action No. 6 will follow the result of action No. 8. In support of their notice of motion the respondents to this appeal filed a number of affidavits. Once a person has chosen to depose to certain facts in a court it is preposterous to refuse to be cross-examined on them simply because he is a person who would otherwise have diplomatic immunity. That is plain beyond peradventure simply as a matter of logic. This matter, however, is only on the fringe of the case, because when the matter came before the Appeal Court of Hong Kong there were in effect three appeals and three arguments. The first from the refusal to grant diplomatic immunity; the second from the striking out of the affidavits; and the third from the refusal of the substantive motion. Only the third of those is now before the Board, the first two being still pending in the Hong Kong

Appeal Court, and the diplomatic immunity point may indeed in due course come before this Board, so it is not desirable to treat it as a substantive ground of appeal now.

The ratio decidendi of Reece J. on the substantive motion is contained in one sentence of his decision, where he said: "I am "of the opinion that the state of the law on the question of the "impleading of sovereign States requires the foreign State "claiming immunity from the jurisdiction of the court to satisfy "the court that it has at least an interest in the property whose "release is sought and this can only be done by evidence which "has been found to be satisfactory and trustworthy." The judge simply said that without the affidavits the respondents could not prove their case. The question is whether, even assuming that the judge was right on the diplomatic immunity point and in striking out the affidavits, the Court of Appeal were right in saying that there was nevertheless material on which the judge could have come to a different conclusion on the impleading motion.

Where an action is not in name against a sovereign State—but is, e.g., in rem against a ship—the sovereign State has to establish facts on which it can rely in order to enjoy immunity—facts which prove a proprietary right with which the judgment in the action would interfere. Under the relevant charter in this case—a time charter—the owners through their master and crew were in possession of the vessel. The original documents of title to the vessel have never passed out of the ownership of the appellants. It is submitted that there is no material on which the Appeal court could hold that there was a contract of sale. On the facts here there is no basis for finding possession in the respondents.

The authorities establish that bare assertion of a right is not enough to entitle the sovereign State to immunity; it is not enough for it to say simply that it is entitled to the property. It is not accepted that the appellants impleaded anybody directly except the ship. The test whether a government is impleaded is an objective, not a subjective, test. The strength of the appellants' case resides in the fact that there never was any authority to sell the ship at all. If the respondents at the time when they sought to claim immunity had nothing more than a bare assertion that they were owners, they are not impleaded and are not entitled to claim immunity in a case of this character.

The first proposition is that there is no absolute rule that a foreign independent sovereign cannot be impleaded in our courts in any circumstances. The direct authority for that is *Sultan of Johore* v. *Abubakar Tunku Aris Bendahar*,[1] where Viscount Simon, giving the judgment of the Board, said: "Their Lord-"ships do not consider that there has been finally established "in England . . . any absolute rule that a foreign independent "sovereign cannot be impleaded in our courts in any circum-"stances." But there is a general principle, support for which is found in *The Parlement Belge*,[2] which contains perhaps the most frequently cited passage in this connexion: "The principle "to be deduced from all these cases is that, as a consequence "of the absolute independence of every sovereign authority, and "of the international comity which induces every sovereign State "to respect the independence and dignity of every other sovereign "State, each and every one declines to exercise by means of its "courts any of its territorial jurisdiction over the person of any "sovereign or ambassador of any other State, or over the public "property of any State which is destined to public use. . . ." That passage enshrines the general principle, which was also stated in *Compania Naviera Vascongado* v. *S.S. Cristina*[3] by Lord Atkin as follows: "The first proposition is that the courts "of a country will not implead a foreign sovereign, that is, they "will not by their process make him against his will a party to "legal proceedings whether the proceedings involve process "against his person or seek to recover from him specific property "or damages. The second is that they will not by their process, "whether the sovereign is a party to the proceedings or not, "seize or detain property which is his or of which he is in "possession or control." There has been a gloss put on that passage in *United States of America and Republic of France* v. *Dollfus Mieg et Cie. S.A. and Bank of England.*[4]

The second proposition is that to claim immunity the foreign sovereign has to show that the jurisdiction would have to be exercised either over the person of the sovereign or his ambassador, or over what is the public property of the State; and that means something which is State property, not which is said to be such property. The next proposition is that the courts have now reached the stage when no further extension of the principle of immunity will be permitted: the *Dollfus Mieg* case.[5] Next, a mere assertion by a foreign sovereign State that it possesses a right is not to be accepted as bringing proceedings within the first or second principle—that the jurisdiction would have to be exercised over person or property. A mere assertion is not enough: *The Cristina.*[6] There is no half-way house, and even if there were, the respondents have not reached it on the evidence. *Kahan* v. *Pakistan Federation*[7] is an illustration of the way in which the first rule of Lord Atkin in *The Cristina*[8] is applied.

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[1] [1952] A.C. 318, 343; [1952] 1 T.L.R. 1106; [1952] 1 All E.R. 1261.
[2] (1880) 5 P.D. 197, 214.
[3] [1938] A.C. 485, 490; 54 T.L.R. 512; [1938] 1 All E.R. 719.
[4] [1952] A.C. 582, 615; [1952] 1 T.L.R. 541; [1952] 1 All E.R. 572.
[5] [1952] A.C. 582, 607.

With regard to the authorities: in *The Cristina*[8] possession was proved, and by affidavit evidence. Enough has to be proved to establish an interest in the property, and if the claimant fails to do that he has not shown that he is interfered with by the jurisdiction. On the evidence in the present case the respondents have not proved anything which would give them a right to immunity: a bare assertion is not enough. [*The Parlement Belge,*[9] *Mighell* v. *Sultan of Johore*[10] and *The Broadmayne*[11] were referred to.] In *Vavasseur* v. *Krupp*[12] it was admitted that the shells were the Mikado's property, so there was no mere assertion in that case. The present case is outside the ambit of the decision in *The Crimdon.*[13] In *The Gagara*[14] it was established that the ship was in the lawful possession of the party claiming immunity; and in *The Porto Alexandre*[15] the ownership of the vessel was established by a statement from our government. Reliance is placed somewhat strongly on *The Jupiter*[16] because not only was there affidavit evidence on behalf of the claiming sovereign, but that affidavit evidence was cross-examined. [*The Jupiter* (*No.* 2)[17] and *The Jupiter* (*No.* 3)[18] were also referred to.] Those judgments were commented on in, and have to be read in the light of, *The Cristina,*[19] which is perhaps the strongest case for the appellants here. *Haile Selassie* v. *Cable and Wireless Ld.*[20] is authority of the Court of Appeal adopting the portion of Lord Maugham's speech in *The Cristina,*[21] on which reliance is placed here. It was said in terms by Goddard L.J. in *The Arantzazu Mendi*[22] that "where

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[6] [1938] A.C. 485, 515.

[7] [1951] 2 K.B. 1003; [1951] 2 T.L.R. 697.

[8] [1938] A.C. 485.

[9] 5 P.D. 197.

[10] [1894] 1 Q.B. 149; 10 T.L.R. 115.

[11] [1916] P. 64, 76; 32 T.L.R. 304.

[12] (1878) 9 Ch.D. 351.

[13] (1918) 35 T.L.R. 81.

[14] [1919] P. 95; 35 T.L.R. 259.

[15] [1920] P. 30; 36 T.L.R. 66.

[16] [1924] P. 236; 40 T.L.R. 815.

[17] [1925] P. 69, 78; 41 T.L.R. 321.

[18] [1927] P. 122; (C.A. 250); 43 T.L.R. 210; (C.A. 741).

[19] [1938] A.C. 485.

[20] [1938] Ch. 839, 848; 54 T.L.R. 996; [1938] 3 All E.R. 384.

[21] [1938] A.C. 515.

[22] [1939] P. 37, 55; 55 T.L.R. 71; [1938] 4 All E.R. 267.

J. C.

1954

Juan Ysmael & Co. Inc. v. Indonesian Government.

" a claim for immunity is made by a foreign sovereign, it is not " enough that his claim should be ' a bare assertion of right ' "; and what the Appeal Court in Hong Kong did in the present case was to quote the passage from Goddard L.J.'s judgment in *The Arantzazu Mendi* [22] without the above sentence; it requires the opposite construction to that which they have put on it. It is not enough, when any interest, whether property, ownership, possession or control, is claimed by the foreign government, to rely solely on the ipse dixit of the government to establish the facts giving rise to immunity. The foreign government has to establish facts which do give rise to immunity, and in the *Dollfus Mieg* case [23] the House of Lords even looked at additional material which had not been available to the courts below. The matter has reached finality. The proposition for which the appellants here are arguing is stated in a convenient form in the speech of Lord Tucker in the *Dollfus Mieg* case [24]: " As " soon, however, as it is made to appear to the court that by " such action it is being asked to exercise its territorial jurisdiction over property in the possession or under the control of " a foreign sovereign the court will decline jurisdiction and stay " the proceedings. Before this stage is reached it will often be " necessary for discovery to be had and the present case is, in " my opinion, one in which discovery was much to be desired." [Reference was also made to *The Arantzazu Mendi* before the House of Lords.[25]]

It is submitted that the above cited cases support the propositions which were urged in opening. The evidence is that the appellants had the ownership and the right to possession; the respondent government may have had a right to a charter which ran out on June 30, 1952—three days after the issue of the writ —and which may have entitled them to order repairs to be done to the ship. The respondents on the evidence, however, have failed to establish anything which on the authorities gives them a right to immunity. No relief which the appellants have claimed in the writ impleads the respondents in respect of any right to which they were at any stage according to the evidence ever entitled; therefore they are not impleaded by the writ. Admittedly, if they can establish possession the cases show that they would have been impleaded.

[22] [1939] P. 37, 55.

[23] [1952] A.C. 582.

[24] Ibid. 620.

[25] [1939] A.C. 256, 263; 55 T.L.R. 454; [1939] 1 All E.R. 719.

Sir Hartley Shawcross Q.C. and *R. I. Threlfall* for the respondents. No more important case has come before the courts of this country on this aspect of the doctrine of immunity than this case, which illustrates in an acute way the logical conclusion of the doctrine so far as it relates to claims based on title rather than possession. The real point is that it would be a very odd thing if this rule of sovereign immunity, which our law incorporated from the international law, rested upon the fortuitous circumstance that in our technical rules of procedure some actions are in rem and some in personam. It is not in dispute that if this action had been brought in personam it would have been bad; and it is impossible to think that the application of this doctrine can possibly rest on fine distinctions of English procedure between actions in rem and actions in personam. So it is submitted with confidence that if the claim of the appellants here is right, it is an end of the doctrine of sovereign immunity in so far as the doctrine depends upon title. Here they have chosen to ask the court for a decision as to title. A writ in rem against persons claiming an interest in the ship is a direct impleading.

The whole basis of the doctrine is convenience, comity. That is why assertion of title and not proof of title has hitherto been regarded as enough—and the Board is only concerned here with an assertion of title. There are two aspects: (1) If it is an impleading, that is an end of the case. (2) If there is no direct impleading, is this none the less an action which affects some interest of the sovereign State; and then the question is, does that interest have to be proved, or is it enough for it to be asserted? It is clear beyond doubt that this action is directed against a foreign sovereign government. The appellants had got possession of the ship already, what they want is a declaration of their title—the title to ownership tried. By our technical procedure, this being a ship, the procedure is therefore in rem, but it is submitted that the position as to immunity is exactly the same.

It is submitted with regard to the facts: (1) The president of the appellant company had general charge of the business of the company and could sign and execute contracts on its behalf. (2) The president had expressly authorized Starr to negotiate a sale of the ship, and he and the vice-president knew that such negotiations were taking place, and the board itself knew from time to time that Starr was negotiating for a sale. (3) The sale price was $450,000; it is in issue whether or not the Indonesian

Government was entitled to a set-off for charter rent against that price. (4) Starr was in possession of a power of attorney which, whether valid as such or not, constituted him an agent with ostensible authority to charter or sell the vessel on such terms as he chose, and to receive payments, this power being expressly confirmed on March 6, 1951. (5) The appellants did not purport to cancel the power of attorney until long after the purported sale. And even if Starr's agency—in contradistinction to his power of attorney—was cancelled, there is no evidence that the cancellation was brought to the notice of the respondents, and the cancellation was in any event rescinded when the appellants told Starr to resume his work and duties and so informed the respondents. (6) Between January and February, 1952, the president and vice-president of the appellant company were informed in writing on the respondent's behalf that the vessel had been chartered to the respondents with an option to buy, and with the right to set off the charter rent. (7) The appellants, although objecting to the deduction, did not repudiate the charter or the option to buy. (8) The appellants had received a copy of the immediately preceding charter, the rents on which the respondents claimed to deduct. (9) The appellants knew that the respondents were insisting that there was a right to set off the previous charter rents. (10) The respondents were also alleging that they were owed $100,000 in January, and thereafter they incurred expenditure for wages and food allegedly on behalf of the appellants, but for which it is not suggested that the appellants ever reimbursed them. (11) Starr also incurred expenditure allegedly on behalf of the appellants. (12) Starr purported to sell the ship to the respondents on February 13, 1952, and this purported sale was allegedly completed by bill of sale on March 17, 1952. (13) The facts as to this were known to the appellants at the latest during May.

(14) Thereafter the ship was, to the knowledge of the appellants, registered in Indonesia and wore the Indonesian flag, a flag-changing ceremony taking place in the presence of a representative of the Panamanian authority. (15) The vessel had left Indonesia on March 6, 1952, where she had been under the control of the Indonesian Government, for Hong Kong, and it so left, as the appellants knew, under the orders of the Indonesian Government. (16) The appellants knew that the ship was dry-docking at Hong Kong, but there is no evidence that they ever gave any orders at all or provided any funds to defray the costs of her repairs. (17) The ship was in fact taken to Taikoo Docks

in March for survey for repairs, and negotiations took place as to their costs, the estimate being sent to the Indonesian consulate. (18) The original estimate was too high, and the ship was ordered back by the respondents for repairs at the naval dockyard at Surabaja. (19) The appellants were informed of this by the master, but were not shown to have taken any interest in the repairs or their cost. (20) She was in fact unable to sail back to Indonesia owing to disrepair, and was under repair at Taikoo Docks in accordance with arrangements made with the respondents and at their expense, amounting to $ (H.K.) 280,000 at the date of the writ. (21) There is no evidence of the price agreed or paid by the Indonesian Government for the vessel, although there is a reference to a price of about $300,000. (22) Assuming that the ship was sold for $450,000, there is no evidence to show the state of accounts as between the appellants and Starr, Starr and the respondents, or between the appellants and the respondents, or the amount of the respondents' net cash liability. (23) The object of the procedure in rem was to prevent the Indonesian Government taking the ship away, as the appellants feared it might because of the purported sale, by having it arrested. (24) At the time of the writ and arrest the ship was under charter to the respondents (writ and arrest were on June 27).

It is admitted that on the Record before the Board the respondents have not established a title. But the Board is entitled to infer that the ship was on offer at $450,000; that there were very large sums in account between the appellants and respondents; that Starr, having ostensible authority to sell the ship, did purport to sell it—there is no evidence at what price, and there is no evidence to show what is due from the respondents to the appellants; and finally, the ship was at the time of the writ immobilized and undergoing repairs.

On the question of authority, reliance is placed on the power of attorney, or on the various letters and other communications from the president as constituting Starr an agent with actual authority to sell at $450,000. The president has express power to appoint agents in this case, and this Board is entitled to assume that he was in fact exercising the authority which the board of directors might, if they chose, have delegated to him: *Biggerstaff* v. *Rowatt's Wharf Ld.*[26]

It is submitted, (a) that one cannot implead here at all, and that this is an impleading; and (b) that if that is not right, alternatively, an action should be stayed if it appears that there is an issue for trial in which the foreign government are involved. The respondents say that the ship is theirs, and that is enough; if it is not theirs, it is enough to show that it is claimed as theirs and that there is a triable issue.

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[26] [1896] 2 Ch. 93, 102.

With regard to the refusal of the respondents to have their witnesses cross-examined except at their consulate, a like matter was referred to in argument in *Engelke* v. *Musmann*,[27] but the court did not decide the point.

Turning to the law, the propositions for the respondents are: (1) Although a foreign sovereign may not be impleaded, he is directly impleaded in any action in rem commenced by writ addressed to all persons either claiming or having an interest in the res to which he has appeared as such a person and in which the issue as between the plaintiff and the defendant is as to the validity of that interest. In that case the sovereign is directly impleaded and has not to be required to establish his interest because that is the very subject-matter of the action. (2) The English court will not exercise jurisdiction over the public property of a foreign sovereign State, including ships, which are claimed by that State as its public property, whether they are actually engaged in public service or not. (3) As a corollary to (1) and (2) (supra), such a claim is conclusive and not examinable in any English court. The immunity of public ships extends to proceedings in rem or in personam, and, of course, to arrests: article by Sir Arnold McNair in The British Year Book of International Law, 1921–22, p. 74. Those are the three propositions on which the respondents seek to take their stand, but as a possible view this fourth alternative is put forward as a half-way house: (4) The English court will not entertain jurisdiction in any way binding on a foreign sovereign where that sovereign asserts an interest in the subject-matter of the proceedings and it appears from the circumstances that there is a triable issue as to the validity of that assertion.

(5) The interest necessary to found a claim to immunity need not be proprietary or possessory. The word "interest" is capable of wide connotation and is not a term of art. It is incapable of precise definition, but is wide enough to cover a case of a sovereign at whose expense repairs are being effected to a res with the consent express or tacit of its owner. (6) The

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[27] [1928] A.C. 433, 439; 44 T.L.R. 731.

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writ in rem in the present case did implead the respondents and was calculated so to do, they being the only persons who had claimed any possible adverse interest to the claim by the appellants and apart from whose claim the action would have been wholly unnecessary. Some practical significance is attached to the last proposition, because it is submitted that it would be wrong, in a matter which arises from the international law, to go on the purely procedural rules of English law; and that the substance of this case is that it is an action against the respondents. If it had been in personam for conversion or detinue there could have been no argument; the fact that it is in rem must not be allowed to obscure the substance of the matter.

There does not appear to be one case in the books in which a sovereign has been required to prove his title, or in which after a decision had been taken as to title there would have been anything left to litigate. The general consensus of opinion in the textbooks is that they are in favour of the view already submitted—that a claim, a mere assertion, is sufficient. But there is one notable exception to that: Oppenheim's International Law (Lauterpacht), 7th ed., vol. 1, p. 243; "The mere assertion, unsubstantiated by proof, by a foreign government that it "is the owner of the property . . . does not oust the jurisdiction "of the court." Phillimore's International Law, 2nd ed., vol. 1, p. 392 et seq., is saying clearly that an assertion of ownership is enough and that one cannot go beyond it. Other writers to the same effect are Higgins and Colombos, International Law of the Sea, 2nd ed. (1951), p. 178; Roscoe's Admiralty Practice, 5th ed. (1931), p. 260; Halsbury's Laws of England, 2nd ed., vol. 6, p. 197; British Year Book of International Law, 1921–22, p. 74.

The authorities, as they stand, are in the respondents' favour: *The Exchange*[28]; *The Parlement Belge*,[29] where it was clearly said that the matter could not be inquired into: *The Annette*; *The Dora*[30]; *Haile Selassie* v. *Cable and Wireless Ld.*[31] is really of no help here; it was dealing with an action in personam and not in rem; *The Arantzazu Mendi*,[32] which is relied on because in the present case the respondents have at any rate been shown to have an interest in respect of repairs; Lord Goddard's language in that case could not have been better chosen for application to the circumstances of the present case; *Aksionairnoye Obschestvo A.M. Luther* v. *James Sagor & Co.*[33] is a judicial opinion entirely in the respondents' favour; *The Jupiter* (*No.* 1),[34] if the Board allows the present appeal they will have to say that that decision was wrong; there appears not to have been any adverse comment on it in any of the textbooks, and it has been approved and cited in many cases; Lord Atkin said that there was there an impleading in words which are directly referable to the facts of the present case; the judgment was adopted on appeal.[35] [Reference was also made to *The Arantzazu Mendi*[36]; *The Cristina*,[37] where it was questioned by Lord Wright and Lord Maugham whether mere assertion is enough; the *Sultan of Johore* case[38] and the *Dollfus Mieg* case.[39]]

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[28] (1812) 7 Cranch 116, 146.

[29] 5 P.D. 197, 219.

[30] [1919] P. 105, 111; 35 T.L.R. 288.

[31] [1938] Ch. 839.

[32] [1938] P. 233, 248; [1939] P. 37, 51, 55.

If the Board feel that the view of Goddard L.J. in *The Arantzazu Mendi*[40] is the right one in this case—that a bare assertion is not enough—then it is submitted that the Board ought properly to look at the whole of the excluded evidence. Reece J. was wrong in excluding the affidavit evidence. If Goddard L.J.'s view is wrong, then the facts are that here is in effect an Indonesian ship, registered in Indonesia, and sold in a way which the respondents were entitled to assume was valid. The Board are asked to say that the purported sale was invalid; if that is not an impleading, what is impleading? If the appellants are right, what is left of the doctrine of immunity when the proceedings are in rem?

Lord Hailsham in reply. The respondents' case ultimately stands or falls by whether they succeed in establishing that a mere assertion of right or title is enough in order to achieve immunity. There is no such thing as a half-way house; Goddard L.J. in *The Arantzazu Mendi*[40] never said anything of the sort, and if he had, he would have been clearly wrong. A bare assertion is not enough. The respondents have failed to produce a single case which would have been decided differently if the appellants are right. Dicey's Conflict of Laws, 6th ed. (1949), p. 133, is in the appellants' favour. *Compania Espanola* v.

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[33] [1921] 3 K.B. 532, 544; 37 T.L.R. 777.

[34] [1924] P. 236, 238.

[35] [1927] P. 122, 137.

[36] [1939] A.C. 256.

[37] [1938] A.C. 485, 506, 511, 517, 520.

[38] [1952] A.C. 318, 343.

[39] [1952] A.C. 582, 604, 613–21.

[40] [1939] P. 37, 55.

Navemar[41] shows that the United States Supreme Court takes the same view about a mere assertion that the appellants here are urging; although that case is not binding on the Board, it is a precise authority of the highest possible persuasive character. In the *Dollfus Mieg* case[42] it is expressly stated that a mere claim is not enough, and the Board's reasoning in the *Sultan of Johore*[43] is cogent on this question. [*Government of the Republic of Spain* v. *National Bank of Scotland*[44] was also referred to.] *The Annette*[45] is also really an authority in the appellants' favour. Lord Wright, in *The Cristina*,[46] was correct in his interpretation of *The Jupiter*[47]: so far as *The Jupiter*[47] said that a bare assertion is enough it cannot be relied on—it is against the whole current of authority. The respondents here have not established enough to retain an interest of any sort; that is the answer to the half-way house argument. The fact that the Government of Indonesia had made some payment for repairs could never give them a claim to immunity. Where, as here, the respondents have condescended to elaborate the position in such a way as to seek to establish on the evidence that there was no case in fact or in law, the plea of immunity must necessarily fail. One must then look at their claim to see if they have made out anything, and it is submitted that they have not.

Oct. 7. The judgment of their Lordships was delivered by EARL JOWITT, who stated the facts set out above, and continued: The rule according to a foreign sovereign government immunity against being sued has been considered and applied in many cases. The basis of the rule is that it is beneath the dignity of a foreign sovereign government to submit to the jurisdiction of an alien court, and that no government should be faced with the alternative of either submitting to such indignity or losing its property. The rule was stated by Lord Atkin in the case of *The Cristina*[1] as involving two propositions. The first, that the courts of a country cannot implead a foreign sovereign; and the second, that they would not by their process, whether the sovereign is a party to the proceedings or not, seize or detain property which is his or of which he is in possession or control. Dicey, 6th ed., p. 131,

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[41] (1938) 303 U.S. 68, 75–6.

[42] [1949] Ch. 369, 382–3.

[43] [1952] A.C. 318.

[44] 1939 S.C. 413, 415.

[45] [1919] P. 105.

[46] [1938] A.C. 485, 508.

[47] [1924] P. 236.

[1] [1938] A.C. 485, 490; 54 T.L.R. 512; [1938] 1 All E.R. 719.

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in a passage in his "Conflict of Laws" approved by Lord Radcliffe in the case of *Dollfus Mieg*,[2] stated the rule in these terms: "The court has . . . no jurisdiction to entertain an action "or proceeding against (1) any foreign sovereign. . . . Any action "or proceeding against the property of [a foreign sovereign] is "an action or proceeding against such person."

In whichever way the rule is stated it is apparent that difficulty may arise in the application of the second branch of it. Where the foreign sovereign State is directly impleaded the writ will be set aside, but where the foreign sovereign State is not a party to the proceedings, but claims that it is interested in the property to which the action relates and is therefore indirectly impleaded, a difficult question arises as to how far the foreign sovereign government must go in establishing its right to the interest claimed. Plainly if the foreign government is required as a condition of obtaining immunity to prove its title to the property in question the immunity ceases to be of any practical effect. The difficulty was cogently expressed by Lord Radcliffe in the case of the *Dollfus Mieg*, where he said [2]: "a stay of proceedings on the "ground of immunity has normally to be granted or refused at a "stage in the action when interests are claimed but not established, and indeed to require him [i.e., the foreign sovereign] "to establish his interest before the court (which may involve "the court's denial of his claim) is to do the very thing which "the general principle requires that our courts should not do."

In the case of *The Jupiter*,[3] where the writ was in rem against the ship, Scrutton L.J. based his judgment on the view that an assertion by a foreign sovereign that he claimed a right in property must be accepted by the court as conclusive without investigating whether the claim be good or bad. The Lord Justice concluded his judgment by saying [4]: "I am content to rest my decision in "this case on the fact that this writ requires a foreign sovereign "to appear in these courts to defend what he alleges to be his "property, and by the principles of international comity the "courts of this kingdom do not allow such steps to be taken "against foreign sovereigns." The view that a bare assertion by a foreign government of its claim is sufficient has the advantage of being logical, and simple in application, but it may lead to a very grave injustice if the claim asserted by the foreign government is in fact not maintainable, and the view of Scrutton L.J. has not found favour in subsequent cases.

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[2] [1952] A.C. 582, 616; [1952] 1 T.L.R. 541; [1952] 1 All E.R. 572.

[3] [1924] P. 236; 40 T.L.R. 815.

[4] [1924] P. 244.

In the case of *The Cristina*[5] the action was commenced by a writ in rem against the ship, and the foreign government which sought to have the writ set aside claimed to be in possession of the ship. Lord Wright, in his speech, noted that the fact of possession was proved, and he added[6]: " It is unnecessary here " to consider whether the court would act conclusively on a bare " assertion by the government that the vessel is in its possession. " I should hesitate as at present advised so to hold, but the " respondent here has established the necessary facts by " evidence." Lord Maugham in his speech dealt with the matter at more length and expressed the view that[7] " There is, I think, " neither principle nor any authority binding this House to " support the view that the mere claim by a government or an " ambassador or by one of his servants would be sufficient to bar " the jurisdiction of the court, except in such cases as ships of " war or other notoriously public vessels or other public property " belonging to the State."

In *Haile Selassie* v. *Cable and Wireless Ld.*[8] the plaintiff sued for a debt and a foreign government claimed that it was entitled to the debt, and claimed to have the action stayed, but the foreign government took no part in the proceedings and the Court of Appeal in those circumstances refused to stay the action, accepting the view expressed by Lord Maugham in *The Cristina* case[9] that a mere claim by the foreign government is not enough. In the case of *The Arantzazu Mendi*[10] the writ was in rem claiming possession of the vessel. A foreign government entered appearance under protest and claimed to set aside the writ on the ground that the action impleaded a foreign sovereign State. In the Court of Appeal it was held that the foreign government was entitled neither to the ownership nor possession of the ship, but that it had proved that it had requisitioned the ship, and that the master and owners had recognized such requisition. The court held that this showed a sufficient interest in the foreign government to involve that it was impleaded by the writ, and accordingly the writ was set aside. Goddard L.J., as he then was, expressed the view on the authority of *The Cristina*[11] and *Haile Selassie*[12] cases that where a claim for immunity is made by a foreign sovereign it is not enough that his claim should be a bare assertion of right or a mere claim, and the Lord Justice continued[13]: "But "if the court can see that the question that arises is a question "of competing rights, as in this case here, where we have got the "fact that the owners of the ship admittedly have purported to "give to the foreign sovereign who is claiming immunity rights "over the ship—it may be that those rights are good or it may be "they are bad, that is just what we cannot try—but if they "purport to give rights over their ship and therefore there is more "than a mere claim, and there is evidence before the court on "which it can be shown that the question which is to be decided "in the case is competing rights, then it appears to me the "principle of immunity applies."

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[5] [1938] A.C. 485.

[6] Ibid. 506.

[7] Ibid. 516.

[8] [1938] Ch. 839; 54 T.L.R. 996; [1938] 3 All E.R. 384.

[9] [1938] A.C. 485, 516.

[10] [1939] P. 37; 55 T.L.R. 71; [1938] 4 All E.R. 267, affd. [1939] A.C. 256; 55 T.L.R. 454; [1939] 1 All E.R. 719.

In the House of Lords the view was taken that the foreign government had proved that it was in possession of the vessel and the case therefore was similar to that of *The Cristina*.[14]

In the *Dollfus Mieg* case[15] the plaintiffs claimed from the Bank of England 64 gold bars which the bank held as bailee. Certain foreign governments sought to stay the action on the ground that they were the owners of the bars. The action was stayed as to 51 bars, it having been discovered after the hearing in the court of first instance that the bank had inadvertently parted with 13 of the bars. Their Lordships think it clear that the House of Lords considered the evidence relating to the claim of the foreign governments since most of the learned Lords expressed the view that there should have been more adequate discovery, which would only have been important to enable the court to ascertain all the relevant facts.

In their Lordships' opinion the view of Scrutton L.J. that a mere assertion of a claim by a foreign government to property the subject of an action compels the court to stay the action and decline jurisdiction is against the weight of authority, and cannot be supported in principle. In their Lordships' opinion a foreign government claiming that its interest in property will be affected by the judgment in an action to which it is not a party, is not bound as a condition of obtaining immunity to prove its title to the interest claimed, but it must produce evidence to satisfy the court that its claim is not merely illusory, nor founded on a title manifestly defective. The court must be satisfied that conflicting rights have to be decided in relation to the foreign government's claim. When the court reaches that point it must decline to decide the rights and must stay the action, but it ought not to stay the action before that point is reached. It remains to apply this principle to the facts of the present case.

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[11] [1938] A.C. 485.
[12] [1938] Ch. 839.
[13] [1939] P. 37, 55.
[14] [1938] A.C. 485.
[15] [1952] A.C. 582.

The steamship *Tasikmalaja* was registered on the Panamanian registry. It was acquired by the appellants in the year 1950, and from 1951 onwards was chartered by the appellants to the Government of Indonesia under successive charterparties, the last of which was due to expire on June 30, 1952, three days after the issue of the writ. The vessel was used by the Government of Indonesia for carrying troops, so that the question raised in some of the cases whether a right of immunity can be claimed for a ship used by the foreign government solely for commercial purposes does not arise. The only charterparty produced in evidence is that of January 1, 1951, which was made by Frank Starr as lawful attorney for the appellants, and under it possession of the vessel did not pass to the government. The last charterparty, due to expire on June 30, 1952, has not been produced, and there is no evidence that under it the Government of Indonesia acquired possession of the vessel, nor indeed has it been so claimed in argument. The power of attorney in favour of Starr, which is in evidence, is exhibit AR-1. It is dated November 8, 1950, and constitutes Starr the attorney of the appellants to sell the steamship *Tasikmalaja* for any sum of money or other consideration as to him may seem most advantageous and beneficial to the appellants. The power of attorney was signed on behalf of the appellants by K. H. Hemady as president and general manager. There is some evidence that the power was void under the law of the Philippine Islands, but this matter has not been fully investigated and their Lordships will assume that the power was valid. On January 10, 1952, Hemady wrote to Major Pamoe saying that if the government bought the *Tasikmalaja* there should be no deduction from $450,000 in respect of money paid to Starr on account. In his reply of January 17, 1952, Major Pamoe agreed to act as requested. At the end of January, 1952, Major Pamoe wrote to Hemady a letter in which he said: "We "have chartered the *Tasik.* for six months more until June "this year with option to buy the vessel. The purchase price "of the vessel will be applied to the charter price of the six "months of last year. This contract is settled down already and "we agreed. We can and dared to do this because Mr. Starr has

" the full power of attorney from your company to charter or to " purchase the vessel."

After receipt of this letter, on February 6, 1953, Hemady cabled to Major Pamoe: " We do not agree to deduct any charter " money from purchase price *Tasikmalaja*. Starr inquired and we " answered negatively." This cable was confirmed by letter to Major Pamoe the next day, and on the same day, February 7, Hemady wrote to Starr setting out a copy of the cable sent to Major Pamoe. In spite of these instructions and in complete disregard of them, Major Pamoe and Starr entered into an agreement to sell the ship, and it has not been denied that moneys due under the charterparty were deducted from the purchase money. It appears from the printed case of the Government of Indonesia that the contract for sale was entered into on February 13, 1952, the contract price being U.S. $70,000, and that the sale was completed by bill of sale dated March 17, 1952. The bill of sale is not in evidence, but presumably further particulars of the transaction were contained in the evidence of the respondents which has been struck out. As from the date of the alleged sale the Government of Indonesia have claimed to be owners of the vessel, and have taken various steps to implement their title, including registering the vessel on the Indonesian register, and changing the flag from Panamanian to Indonesian. On March 13, 1952, the vessel was brought by the Government of Indonesia to Hong Kong and was delivered for repair to the Hong Kong & Whampoa Dock Co. Ld., in whose dock the ship was at the time of the issue of the writ. The government claims to have paid large sums to the Dock Company for work done on the vessel. The ship, however, has always remained in the legal possession of the appellants through the acting captain, Jose Silos. On June 30, 1952, the Consul General for the Government of Indonesia at Hong Kong by letter purported to dismiss Silos, but Silos in his answer of the same day refused to accept such dismissal. Their Lordships are satisfied that Silos, as acting captain of the *Tasikmalaja*, has always remained, as he claims in his affidavit, the servant of the appellants, and that legal possession of the vessel never passed to the Government of Indonesia. This, indeed, was not disputed in the argument before their Lordships' Board.

The result appears to be this. The charterparty under which the Government of Indonesia had control of the vessel expired on June 30, 1952, at the latest, even if it had not been previously repudiated. At the date when immunity was claimed by the

Government of Indonesia, namely, July 9, 1952, which is the date on which the validity of the claim first fell to be considered, the Government of Indonesia had no interest whatever in the vessel except such as arose under the alleged purchase of February 13, 1952. The negotiations for the sale and purchase of the ship were conducted between Starr and Major Pamoe. Starr was purporting to act as agent of the appellants as sellers and Major Pamoe as agent for the Government of Indonesia as purchasers. In fact, Starr had no authority to sell the ship on the terms specified in the agreement of sale, and Major Pamoe was fully aware that he had no such authority. However wide the powers originally given to Starr may have been, it is clear that they could be withdrawn or modified by the appellants. The cable and letters of February 6 and 7, 1952, from Hemady to Starr and Major Pamoe make it clear that the vessel could only be sold on certain conditions, and Starr and Major Pamoe subsequently purported to agree to a sale of the ship in complete disregard of these conditions. The evidence in the record of their title to the ship set up by the Government of Indonesia appears therefore to their Lordships to be manifestly defective, since even if Major Pamoe did not disclose the position to his employers, the Government of Indonesia, yet he was the agent of that government in carrying out the purchase, and his knowledge must be attributed to the government. For these reasons their Lordships think that the Government of Indonesia have not established that they possess such an interest in the steamship *Tasikmalaja* as would show that they were impleaded. Accordingly, there is no ground for setting the writ aside.

Their Lordships will therefore humbly advise Her Majesty that this appeal be allowed, that the judgment of the Appeal Court in Hong Kong dated December 13, 1952, be set aside, including the declaration that the judgment of Reece J., dated October 24, 1952, was null and void for want of jurisdiction, and that the matter be remitted to the Appeal Court to consider the other questions raised in the appeal. All costs incurred in the courts in Hong Kong shall be dealt with by the Appeal Court. The respondents must pay the costs of the appeal to their Lordships' Board.

Solicitors: *Reid Sharman & Co.; Markby, Stewart & Wadesons.*

WONG POOH YIN *alias* KWANG SIN *alias* KAR SIN . . . . APPELLANT;

AND

PUBLIC PROSECUTOR . . . . . RESPONDENT.

J. C.*
1954
June 30:
July 27.

ON APPEAL FROM THE COURT OF APPEAL OF THE FEDERATION OF MALAYA.

Malaya, Federation of — Criminal law — Carrying a firearm without lawful authority—Lawful excuse a distinct issue—Capable of proof by supervening events—Government pamphlets relevant—Emergency Regulations, 1951, *reg.* 4 (1) (*a*).
Criminal Law—" Lawful excuse."

By the Emergency Regulations, 1951, of the Federation of Malaya, reg. 4 (1): " Any person who without lawful excuse . . . " carries . . . (*a*) any firearm, without lawful authority therefor " . . . shall be guilty of an offence . . ."

The appellant, who was charged under regulation 4 (1) (*a*) of the Emergency Regulations with carrying a firearm without lawful authority, gave evidence to the effect that he was carrying the firearm while on his way to surrender to the police in compliance with directions contained in Government pamphlets calling on terrorists to surrender with their arms, that he wanted to surrender the firearm to the police, and that he had already tendered it to certain Temiars to whom he had made his first offer of surrender. He contended that that constituted a lawful excuse for carrying the firearm. He was convicted of the offence charged. It was conceded before the Board that the trial judge had withheld the plea of " lawful excuse " from the consideration of the assessors:—

Held, that " lawful excuse," as used in the regulation, was an expression of wider import than " lawful authority " and raised a distinct issue. A mere change of intention on the part of a person accused under regulation 4 (1) did not amount to a " lawful excuse," but in the present case the evidence of the appellant was not confined to a mere change of his intention, for he sought also to show the reason for that change in the invitation contained in the Government pamphlets, and he described in addition, inter alia, his purported offer to surrender the weapon to the Temiars. There was no reason for holding the evidence about the pamphlets irrelevant on the issue of " lawful excuse." Circumstances supervening subsequent to an acquisition which was unlawful might nevertheless be capable of establishing a lawful excuse, and here the evidence of the appellant, if accepted, went far enough to justify a finding that he was carrying the firearm on the occasion charged in the course of complying with the Government's request and because he wanted and was waiting to surrender with it to the police and had actually tendered it to the Temiars. Such a finding would have warranted a verdict of "lawful excuse" and that issue ought to have been left to the assessors. It by no means followed that, had that course been taken, the appellant would have been acquitted, but he might have been, and in the light of *Ibrahim* v. *The King* [1914] A.C. 599, 615; 30 T.L.R. 383, the verdict could not stand.

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* *Present*: LORD MACDERMOTT (L.C.J. NORTHERN IRELAND), LORD COHEN, MR. L. M. D. DE SILVA.

[Reported by MISS ELAINE JONES, Barrister-at-Law.]

Dickins v. *Gill* [1896] 2 Q.B. 310; 12 T.L.R. 427, and *Winkle* v. *Wiltshire* [1951] 1 K.B. 684; [1951] 1 T.L.R. 368; [1951] 1 All E.R. 479 distinguished.

Judgment of the Court of Appeal of the Federation of Malaya reversed.

APPEAL (No. 9 of 1954) from a judgment of the Court of Appeal of the Federation of Malaya (October 5, 1953), whereby, for reasons delivered later (November 12, 1953), Wong Pooh Yin's appeal from a decision of the High Court at Kota Bharu, Kelantan, convicting him of carrying a firearm without lawful authority under regulation 4 (1) (*a*) of the Emergency Regulations, 1951, of the Federation of Malaya,[1] and sentencing him to death, was dismissed.

The following facts are taken from the judgment of the Board.

The trial took place before Abdul Hamid J., sitting with assessors, the charge being in these terms—"That you, on or "about the 25th day of November, 1952, in the Temiar Ladang "Area known as Gua Chah in the District of Gua Musang, Ulu "Kelantan, did carry a firearm, to wit, a white handled revolver ".38 without lawful authority therefor and thereby committed an "offence punishable under regulation 4 (1) (*a*) of the Emergency "Regulations, 1951."

The evidence adduced by the prosecution, in proof of the offence charged, was clear. It showed beyond any question that, on the date and at the place named, the appellant was carrying the revolver described, and that he had no lawful authority to do so. The appellant did not seek to challenge those facts. His defence was simply that on the occasion referred to in the charge he had a lawful excuse for carrying the weapon.

[1] Emergency Regulations, 1951, reg. 4: "(1) Any person who without lawful excuse, the onus of "proving which shall be on such "person, carries or has in his possession or under his control—(*a*) any "firearm, without lawful authority "therefor; or (*b*) any ammunition or "explosive without lawful authority "therefor, shall be guilty of an "offence and shall on conviction be "punished with death."

The appellant was the only witness called in support of that plea. He "went underground," he said, in November, 1949, and after being in different places eventually came to Kelantan. He belonged to a party of 60 or 70 terrorists, but left them with a companion some 10 days before he got in touch with the Temiars by whom he was subsequently arrested. His story, after leaving this party, may best be told by the following excerpts from the note of his evidence as taken at the trial:—"I left them because whilst in the jungle "we have read the Government pamphlet calling on us to come "out to surrender and that we would be properly treated. The "two of us left the party with the intention to surrender to the "authorities. We carried with us our ammunition. I brought "out [the revolver]. After getting away from my com-"rades I first contacted 5 or 6 Temiars who are not in court. I "speak little Temiar. I told those few Temiars that I and my "friend wanted to surrender to the authorities and requested "them to assist and that we wanted to see the Penghulu. They "made known to us that they would arrange our surrender to the "police. They went away after the conversation."

Then, after a reference to the purchase of food from the Temiars, he continued—"On November 24 between eight and "nine Temiars came among whom was P.W.2 [the assistant "Penghulu]. They told us that the Government was willing to "let us surrender but we had to wait for some time to enable them "to make arrangements. We told them that as we desired to "surrender they could take away our ammunition and firearms. "We were told to keep them till it was arranged for the police "to take them away. It was indicated to us that we would have "to move on the next day to a place nearer to the police station.

"On November 25 about eight Temiars came. P.W.2 was "among them. They took us to the new place. Arriving at the "new place they brought us a dog which we slaughtered and ate. "On the same day at about 3 p.m. about 60 Temiars came under "the leadership of P.W.1 [the Penghulu]. I greeted P.W.1 "warmly. I shook his hand and saluted 'Selamat.' P.W.1 said "that arrangements for our surrender had been completed and "that the Government regulations were that our hands must be "tied up. Our hands were tied to the back. When I was on the "point of having my hands tied up I surrendered my revolver "and ammunition to one of the Temiars in the presence of "P.W.1. The attitude of the 60 Temiars towards me was "friendly when they came. When they led me away I thought "they were taking me for the purpose of surrender. I did not "surrender to the police because from the Government pamphlets "that I have read it would be better to contact the public to "arrange for me to surrender. Further as I had firearm there "would be misunderstanding if I were to go to the police direct."

The trial judge, in the course of his summing-up to the assessors, said: "You have heard the submission of learned "counsel for the defence that it could not be an offence if the "accused had the genuine intention to surrender the revolver "and to offer it to the first group of Temiars. To this submission "I am not inclined to agree because intention to surrender is no "defence to a charge of possession or carrying of a firearm. If "this can be a defence any accused person found with a firearm "can always absolve himself from the charge by saying that at "the time he was found with it he had the intention to surrender "it to the authorities. That defence can only go towards mitigating the sentence." The assessors, without retiring, then found the appellant guilty and the judge, agreeing with their opinions, convicted the accused and sentenced him to death.

On appeal, the appellant contended that there had been a misdirection respecting the defence of "lawful excuse," but the Court of Appeal (Mathew C.J., Wilson and Buhagiar JJ.) held that the judge had "rightly rejected the submission of counsel "for the accused at the trial that a 'lawful excuse' had been "established which entitled the accused to acquittal," and dismissed the appeal.

The accused appealed.

1954. June 29, 30. *Dingle Foot Q.C.*, *Colvin de Silva* and *T. O. Kellock* for the appellant. The trial judge withdrew the issue of "lawful excuse" from the assessors. Looking at the whole of the evidence, it is not possible to say that the assessors would have reached the same decision had they been directed that "lawful excuse" was an issue which they ought to consider. The judgment of the Supreme Court went even further in saying that once an original possession was against the law there could never be a "lawful excuse": in other words, that an intention to surrender expressed in the making of all arrangements in conjunction with the police for the delivering up of weapons could not avail. It is not necessary to submit that a mere intention to surrender would constitute a "lawful excuse," for here the acts of the accused in complying with the invitation contained in the Government pamphlets are relied on. If he was under a duty to comply with the invitation, then the act of compliance certainly amounted to a "lawful excuse." Nevertheless, it is submitted that "lawful excuse" exists whenever there is an intention to comply with the law. A man who is bringing in weapons to surrender them has a "lawful excuse" from the moment he forms that intention: *Mwangi S/O Wambuga* v. *R.*[2] Any acts subsequently performed merely provide evidence of the intention, which is difficult of proof without overt acts. In this connexion the Government pamphlets are relevant. Admittedly the law cannot be altered by any announcement of the Government short of legislation. The position may be put in the following way: the defence set up depends upon proof of the accused's state of mind or his purpose; it is, therefore, permissible to look at the surrounding circumstances coupled with his actions.

The history of the relevant regulation shows that the words "without lawful excuse" did not originally appear therein, but being now incorporated effect has to be given to them. The regulation seems to contemplate two different possibilities—that firearms may be carried without "lawful authority" and without "lawful excuse." It is submitted that the meaning of "lawful "authority" and "lawful excuse" can be clearly distinguished. In considering "lawful authority" one has to inquire how the firearm was originally acquired, although it is possible that a possession originally lawful could become unlawful, for instance, in the case of a person who, having acquired a firearm under a licence, subsequently becomes a terrorist. Conversely, it is submitted that a possession originally unlawful can become lawful. It was not disputed in *Sambasivam* v. *Public Prosecutor, Federation of Malaya*[3] that "carries" means "carries knowingly." The term "lawful" has a wider meaning than "legal." In *Rex* v. *Ward*,[4] on a charge of being found by night with certain instruments of housebreaking, it was held to be a "lawful "excuse" to show that the implements were those of the accused's profession and that, where the implements could be used for innocent or guilty purposes, intention was a relevant factor. In *Roberts* v. *Local Authority of the Burgh of Inverness*,[5] where an admitted breach of the regulations concerned was committed in good faith, this was held to amount to a "lawful excuse."

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[2] Criminal Appeal No. 168 of 1954 of the East African Court of Appeal from Kenya.

[3] [1950] A.C. 458; 66 T.L.R (Pt. 2) 254.

[4] [1915] 3 K.B. 696.

[5] (1889) 27 Sc.L.R. 198.

The cases quoted in the judgment of the Supreme Court as being adverse to the contention put forward on behalf of the appellant can be distinguished. The decision in *Winkle* v. *Wiltshire* [6] depended on the nature of the original acquisition; as the stamps were not legitimately acquired the accused's belief that the transaction was lawful was no excuse. The maxim ignorantia juris neminem excusat applied. A man who is in possession of a revolver without a licence cannot plead innocent intention or that he did not intend to do any harm. Innocent intention is distinguishable from "lawful excuse." In both the above examples the accused would be attempting to maintain his right to possession; in the present case that is not so. Supposing, on the other hand, that a man having no licence to possess firearms borrowed a firearm from a neighbour believing that his house was about to be attacked, it would be a question for the jury whether that could amount to "lawful excuse." In *Winkle* v. *Wiltshire* [6] there was no supervening event and the question whether an originally unlawful possession can become lawful did not arise for decision. Had the possessor of the forged stamps become aware of the true situation and made up his mind to hand them over to the police the case might have been differently decided. He could not have been charged with being in unlawful possession at that moment, though this would have been possible as to his previous possession. *Dickins* v. *Gill* [7] can also be distinguished from the present case. First, the statute there under consideration was one in which provision was made only for "lawful excuse" and not "lawful authority," and in this particular class of statutes it is submitted that "lawful "excuse" must be construed more widely. Secondly, the accused in *Dickins* v. *Gill* [7] was possessed of the die for the precise purpose which the statute was designed to prevent. If the accused had been on his way to deliver up the die the decision might have been otherwise.

If the decision in the present case stands the accused will have been deprived of the substance of a fair trial and the course of justice will have been diverted into a wrongful channel. The conditions laid down in *Ibrahim* v. *The King* [8] for the granting of an appeal by the Judicial Committee are thus fulfilled.

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[6] [1951] 1 K.B. 684; [1951] 1 T.L.R. 368; [1951] 1 All E.R. 479.

[7] [1896] 2 Q.B. 310; 12 T.L.R. 427.

[8] [1914] A.C. 599; 30 T.L.R. 383.

Melford Stevenson Q.C. and *D. A. Grant* for the Crown. This case must be approached on the basis that the trial judge did withdraw the question of "lawful excuse" from the assessors. Nevertheless, it is submitted that once a possession or carrying without "lawful authority" and without "lawful "excuse" has commenced, the mere formation of an intention to surrender cannot provide a "lawful excuse." Implementing actions are no more or less than evidence of the intention and, if the above proposition is correct, those specific acts do not provide a "lawful excuse" or carry the matter any further.

An invitation by the executive government cannot affect the law. Neither the invitation nor the acts in response to it assist the construction of the regulation or throw any light on the meaning of the words "without lawful excuse."

A man who unlawfully carries or acquires possession remains liable until he rids himself of the prohibited article. No act short of that is sufficient, and acts which do fall short merely furnish evidence of intention. The regulation under consideration was designed to impress upon the population that firearms were to be carried at their peril, and when a matter is absolutely prohibited by statute intention is irrelevant both as to the commission of the offence and also as to excuse: *Burns* v. *Nowell.*[9] Intention is only relevant at the time of acquiring possession. Suppose that the accused was carrying the revolver genuinely for the purpose of surrendering to the authorities, that could only amount to "lawful excuse" if he had carried it from the beginning for that purpose. The decision in *Rex* v. *Ward*[10] depended on the question whether the implements were, in fact, housebreaking implements. With regard to *Winkle* v. *Wiltshire,*[11] even had the stamps been locked in the accused's safe waiting to be taken to the police, that would not have amounted to a "lawful excuse." An example of "lawful excuse" would be where a man is in possession of a revolver which has been thrown to him by a police officer requiring aid. One must distinguish the intention which is an essential ingredient of the offence, in this case knowledge on the part of the man that he has the revolver, and the intent which is said to be relevant to lawful excuse. "Lawful excuse" must always spring from the exercise of a common law right or duty. It cannot arise ex turpi causa. If a man whose life is being threatened seizes a gun and uses it to protect himself he would have a lawful excuse; it would be otherwise in the case of a man who obtained a gun for which he had no licence merely because he feared an attack. A man cannot have a lawful excuse until the common law right or duty descends upon him and unless the gun or other article was not in his possession before. For the appellant to succeed in this case it has to be shown that the expression of the desire to surrender was equivalent to a common law duty. The test which has been put forward in the argument for the appellant, "Did he intend to break or comply with the law?" is much too wide.

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[9] (1880) 5 Q.B.D. 444.

[10] [1915] 3 K.B. 696.

[11] [1951] 1 K.B. 684; [1951] 1 T.L.R. 368; [1951] 1 All E.R. 479.

D. A. Grant followed.

Dingle Foot Q.C. replied.

1954. June 30. LORD MACDERMOTT announced that their Lordships would humbly advise Her Majesty that the appeal should be allowed, and that they would give their reasons later.

July 27. The reasons for their Lordships' judgment were delivered by LORD MACDERMOTT, who stated the facts set out above and continued:—At the hearing before the Board counsel for the appellant submitted that the trial judge had withheld the plea of "lawful excuse" from the consideration of the assessors. This submission was accepted as well founded by Mr. Melford Stevenson, on behalf of the Crown, and it also seems to accord with the view taken by the Court of Appeal. When the summing-up is read as a whole their Lordships are satisfied that the appellant is right on this point, and that the issue of "lawful excuse" must be regarded as having been withdrawn from the assessors by the trial judge.

This leaves as the main question for determination in this appeal whether this ruling was sound in law or, to put the matter another way, whether the evidence of the appellant, if accepted by the assessors, was sufficient to sustain a finding of "lawful "excuse" within the meaning of the words as used in the regulation.

Their Lordships doubt if it is possible to define the expression "lawful excuse" in a comprehensive and satisfactory manner and they do not propose to make the attempt. They agree with the Court of Appeal that it would be undesirable to do so and that each case requires to be examined on its individual facts. There are, however, two general conclusions on the construction and effect of the regulation which are relevant to such an examination and which may be appropriately stated at this point. The first of these is that the defence of "lawful excuse" may be sufficiently proved although no "lawful authority" exists for doing what is charged against the accused. The terms of regulation 4 (1) clearly contemplate this and, accordingly, make "lawful "excuse" an expression of wider import than "lawful authority," as defined in regulation 4 (2). It follows from this that in proving a "lawful excuse," which falls short of "lawful "authority," it is the excuse or exculpatory reason put forward by the accused, rather than the carrying, possession or control of the firearm, ammunition or explosive, that must be shown to be lawful. And secondly, it is to be noted that regulation 4 (1) does not call for any special intent on the part of the accused. In *Sambasivam* v. *Public Prosecutor, Federation of Malaya*,[1] the Board accepted the view that knowledge of what is carried, possessed or controlled is an ingredient of this offence; but the prosecution is not obliged to explore the mind of the accused beyond this, or to show that he had any particular purpose or intention.

It is evident that this last consideration weighed with the Court of Appeal, for the Chief Justice, in delivering the judgment of the court, said, after paraphrasing what he considered to be the substance of the appellant's defence: "This is tantamount to saying that a man can change the nature of his act, "from an unlawful to a lawful one, by a mere change in his "intention. That may be true of offences of which intention is "an ingredient, but it is not true of offences to which the doctrine "of 'absolute prohibition' applies."

In so far as this passage decides that a *mere* change of intention on the part of a person accused under regulation 4 (1) cannot, in itself, constitute a "lawful excuse," their Lordships are in agreement with it. They are of opinion that the word "excuse" connotes something more than a change of mind on the part of the person accused, and they consider that the context strengthens this view; the regulation having been so drawn that no special intent is necessary to constitute the offence thereby created, it is, to say the least, unlikely that the expression "lawful excuse" was meant to make proof of some particular intent, without more, an effectual defence.

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[1] [1950] A.C. 458, 469; 66 T.L.R. (Pt. 2) 254.

This, however, does not suffice to dispose of the present appeal, because the evidence of the appellant was not confined to the state of his mind or to a " mere change in his intention "; it went well beyond this. It sought to show not only a change of mind and purpose, but the reason for that change in the invitation contained in the Government pamphlet; and it described, in addition to the overt acts of the appellant in furtherance of his desire to surrender, the events of November 24, 1952 (the day before the occasion to which the charge relates), when, if the appellant is to be believed, he and his companion offered to surrender their weapons to a party of Temiars, including the assistant Penghulu, but were told " to keep them till it was " arranged for the police to take them away."

The question for decision is, therefore, wider than that posed by the Court of Appeal. It is whether all the circumstances of the situation described by the appellant, when taken in conjunction, were enough to sustain a finding of " lawful excuse " in answer to the charge as framed. In approaching this question it will be convenient to refer specifically to several of the points which were taken against the appellant's defence in the Court of Appeal or before the Board.

The first of these is Mr. Stevenson's submission that if (as their Lordships would hold) a *mere* change of intention on the part of a person accused under regulation 4 (1) does not amount to a " lawful excuse," the acts of the accused in implementing that change are no more than evidence of it and cannot, in themselves or when coupled with the change of intention, constitute a " lawful excuse." This submission does not cover the present case, as the facts here offered as excuse are not limited to the appellant's resolve to surrender and his conduct in consequence of that resolve, and their Lordships do not, therefore, propose to express any concluded opinion upon it. While they apprehend that every overt act by an accused person may not suffice to make the defence of " lawful excuse " available, they think it undesirable to decide this particular matter in advance of an instance which makes such a decision necessary. The latitude of the expression under discussion, the infinite variety of circumstance in relation to which it may be invoked, the tendency in this field to confusion between considerations of relevance and weight, and the difficulty which may be experienced in isolating the conduct of an accused person from the impact of external events, are but some of the reasons for leaving this question until it can be settled in the light of a situation that demands an answer.

The next point concerns the evidence relating to the Government pamphlets and their message. It would appear that the Court of Appeal regarded that part of the appellant's testimony as incapable of furthering the defence of "lawful excuse" and, therefore, irrelevant. Thus, in the judgment delivered by the Chief Justice, he said: "We think it right at once to say that "the policy which is adopted by the Government to induce "terrorists to surrender is no concern of ours, and for the courts "to attempt to apply a policy that has not been made the subject "of a written law, can only lead to confusion. Whether an individual is prosecuted or not is a matter entirely for the authorities responsible for launching prosecutions, and it cannot be "submitted successfully as a defence that Government in general "terms has indicated that certain offences would be overlooked "if offenders took a certain course." And later he added this: "If a terrorist after some time in the jungle decides to surrender "with his arms, he has an excuse, and if he is acting on a "'surrender leaflet' addressed to him by the security forces, he "may have a political or an administrative excuse but, in our "opinion, that does not amount to a lawful excuse within the "meaning of the regulation."

In the view of the Board, these passages offer no sound reason for leaving this particular part of the appellant's case out of account. It did not involve the court in applying a policy which had not the force of law, or in holding that the authorities responsible for prosecutions were bound by promises of leniency made by some other branch of Government. There was no suggestion that the pamphlets altered the law or provided "lawful authority" for the carrying of arms. What was suggested was that the evidence about them was relevant and entitled to consideration because it helped to show a "lawful excuse." It is, of course, clear that every act of compliance with the directions of a Government department may not supply a "lawful excuse" for the doing of what would otherwise be an offence. For example, the directions given may themselves be unlawful, or some other element may be present which will taint the act of compliance and make it unlawful. But, looking only to the evidence about the pamphlets as adduced in this case, their Lordships can find no reason for holding it irrelevant on this issue of "lawful "excuse." On the material available it would be going far indeed to say that there was anything unlawful about the pamphlets in question, or that conduct induced by them was without excuse. In a state of emergency an appeal to armed terrorists to surrender may well be a justifiable and proper step on the part of those responsible for the restoration of order, and their Lordships think that the fair assumption, in the present case, is that these pamphlets were appeals of that character. If so, it would be giving the expression "lawful excuse" a narrow and unnatural meaning to hold that it was incapable of applying to acts done by those appealed to in the course of making a genuine response. As already indicated, this view relates to the particular aspect of the evidence which has just been considered. It remains to be seen whether the evidence as a whole sufficed to sustain the defence.

The last submission on behalf of the Crown which calls for notice was to the effect that, as the appellant's possession of the revolver had been unlawful from the beginning, no supervening event could give him a "lawful excuse" for carrying it. This was the substance of the Crown case and, though not so expressed, a similar reasoning seems to underlie the judgment of the Court of Appeal.

In support of this argument reference was made to several decisions, of which it is only necessary to mention the two which are most in point and were cited in the opinion delivered by the Chief Justice. The first of these was *Dickins* v. *Gill.*[2] It relates to a prosecution for an offence under section 7 (*c*) of the Post Office (Protection) Act, 1884, which enacted that "a person shall not "make, or, unless he shows a lawful excuse, have in his "possession, any die . . . for making any fictitious stamp." The defendant, who was the proprietor of a newspaper circulating among stamp-collectors, had caused a die to be made for him abroad, from which representations of a certain Colonial postage stamp could be produced. He had ordered this die and subsequently kept it in his possession solely for the purpose of illustrating one of his publications. The charge preferred against him was not one of making the die, but of having it in his possession. The magistrate who heard the case found that the defendant's conduct was bona fide and that he had not the die in his possession for any improper purpose. He held that this constituted a "lawful excuse" and, accordingly, dismissed the information.

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[2] [1896] 2 Q.B. 310; 12 T.L.R. 427.

On appeal, by way of case stated, a Divisional Court (Grantham and Collins JJ.) held that the facts, including the finding that the defendant intended to use the die only for innocent purposes, did not show a "lawful excuse."

Their Lordships cannot regard this decision as an authority for the proposition now under discussion. Not only did the defence pleaded sound in intention, but it is to be observed that the court was at pains to point out that the possession charged was not innocent. Thus Grantham J. said [3]: "Knowing that the die could not be made in this country, "and with the idea of evading the very penalties that he would "be liable to under this Act if he had made it here, he had it "made abroad. I think that the respondent committed an "offence under that part of the section, and that he could have "been made liable to a penalty under it; he was, in my judg-"ment, acting illegally in having the die made. However that "may be, it seems to me that it would be very difficult to show "innocence after the die so obtained is once in his possession." And again [4]: "But in a case like the present, when a man has "a die made abroad because he knows he cannot have it made "here, how can he have a lawful excuse for its subsequent "possession? Looking at the language of section 7 of the Act of "1884, which absolutely prohibits the making of a die or a ficti-"tious stamp, and omits all suggestion of 'lawful authority' for "such making, I think that the words 'lawful excuse' must be "construed more strictly than they would be if the section had "contemplated a lawful authority for the making." It is, no doubt, true to say that, in that instance, the court looked to the circumstances of the acquisition of the die. But the case was not concerned with the effect of some subsequent supervening situation, and the decision was not directed to any submission resembling that under consideration.

The second case was *Winkle* v. *Wiltshire*.[5] There the defendant was charged with having in his possession without lawful excuse seven fictitious national insurance stamps contrary to section 65 (1) of the Post Office Act, 1908, as applied to stamps of that kind. The material part of this enactment reads: "A person shall not . . . (*b*) have in his "possession unless he shows a lawful excuse; any fictitious "stamp. . . ." The defendant bought the stamps in his own public-house and for his own use from a man who had no licence or other authority which would have enabled him to sell them lawfully. The defendant acted in good faith; he did not know that the stamps were fictitious, he honestly believed that they were genuine and was unaware that the man from whom he purchased had no authority to deal in insurance stamps. The magistrate found that the defendant had shown a "lawful "excuse," but a Divisional Court (Lord Goddard C.J., Humphreys and Devlin JJ.) took a different view and remitted the matter with a direction to convict.

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[3] [1896] 2 Q.B. 310, 315.

[4] Ibid. 316.

[5] [1951] 1 K.B. 684; [1951] 1 T.L.R. 368; [1951] 1 All E.R. 479.

In the opinion of the Board, this decision does not advance the case for the Crown in this appeal. Apart from being distinguishable on its facts, the judgment of Lord Goddard (in which the other members of the court concurred) does not touch upon the effect of a new situation arising after a period of unlawful possession. There was no reason why it should. The case was one in which the excuse offered was plainly based upon the circumstances of an acquisition which the court held to be an unlawful transaction. In the result, the excuse was adjudged unlawful because the acquisition was unlawful. But this is very far from saying that an excuse can never be lawful if it follows upon an unlawful acquisition. And it is also very far from saying that the like result should attend the facts of the present appeal; for the appellant here made no attempt to rest his defence on the nature of his acquisition or on the character of his possession previous to the occasion in respect of which he was charged. On the contrary, his whole case was that he had a lawful excuse, despite his previous guilt, because the facts and circumstances of that occasion gave him an excuse which was lawful and which he had not had before.

Their Lordships cannot, therefore, regard this submission as supported by authority. Nor are they aware of any general principle of law which would be capable of sustaining it. Indeed, it appears to them that the submission runs against the implications of the regulation. As a general proposition it appears to confuse "lawful excuse" and "lawful authority." But as already observed, these expressions raise distinct issues and the question here is not necessarily determined by the absence of "lawful "authority." It is still whether, without having "lawful "authority," the appellant had yet a "lawful excuse."

While the evidence as to the contents of the Government pamphlets was meagre, their Lordships are of opinion that the testimony of the appellant, if accepted, went far enough to justify a finding that he was carrying the revolver on the occasion charged in the course of complying with the Government's request and because he wanted and was waiting to surrender with it to the police when they arrived and had actually tendered it to the Temiars to whom he had made his offer of surrender. In the light of the views already expressed in dealing with the points made against the appellant, their Lordships are unable to resist the conclusion that such a finding would have warranted a verdict of "lawful excuse" and they are, accordingly, of opinion that that issue ought to have been left to the assessors.

It by no means follows that, had this course been taken, the appellant would have been acquitted. But he might have been, and having regard to the conclusions reached and the practice of the Board as stated by Lord Sumner in *Ibrahim* v. *The King*,[6] the verdict clearly ought not to stand.

For these reasons their Lordships have humbly advised Her Majesty that the appeal should be allowed and the conviction and sentence set aside.

Appeal allowed.

Solicitors: *Hy. S. L. Polak & Co.; Charles Russell & Co.*

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[6] [1914] A.C. 599, 615; 30 T.L.R. 383.

MATTHEW OLAJIDE BAMGBOSE . . . APPELLANT;

AND

JOHN BANKOLE DANIEL AND OTHERS . . RESPONDENTS.

J. C.*
1954
July 14, 15;
Oct. 12.

ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL.

West Africa (Nigeria) — *Succession* — *Intestacy* — *Child of marriage under Marriage Ordinance,* 1884 — *Polygamous marriages* — *In accordance with native law and custom*—*Right of issue to succeed on intestacy*—*Applicability of law of England*—*Marriage Ordinance, No.* 14 *of* 1884 (*Lagos*), *s.* 41—*Statute of Distributions,* 1670 (22 *&* 23 *Car.* 2, *c.* 10).

Conflict of Laws—*Succession*—*Legitimacy*—*Domicile of parents at birth of child*—*Polygamous marriage.*

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* *Present:* LORD MORTON OF HENRYTON, LORD COHEN, and LORD KEITH OF AVONHOLM.

J. C.
1954

BAMGBOSE
v.
DANIEL.

The deceased, the child of a marriage contracted under the Marriage Ordinance, 1884, of the Colony of Lagos, which provided in section 41 that the disposable estate of such a person dying intestate should be distributed in accordance with the provisions of the law of England relating to the distribution of the personal estates of intestates, any native law or custom to the contrary notwithstanding, died domiciled in Nigeria and intestate. He was said to have entered into nine polygamous marriages in Nigeria in accordance with native law and custom, and no question of his capacity to do so by his local law arose. As between the appellant, who claimed as lawful nephew of the deceased to succeed to the whole estate, and the respondents, who claimed as legitimate children of the deceased born in Nigeria of the polygamous marriages to exclude him:—

Held, that, subject to the respondents establishing their status of legitimacy under the law of their domicile, they came within the class of persons entitled to succeed under the English Statute of Distributions, which was the relevant law of England in 1884. As a matter of construction and on the authorities that statute could not be limited in its local application to children who were the issue of monogamous unions, and the effect of its application to the cases to which it applied was to fix the order of succession according to a table different from that prevailing under native law and custom.

The principle of *In re Goodman's Trusts* (1881) 17 Ch.D. 266—that if a child is legitimate by the law of the country where at the time of its birth its parents were domiciled, the English law of succession to personalty recognizes that status—is applicable to children of polygamous unions.

In re the Estate of Herbert Samuel Heelas Macaulay, decd. (1951) Cyclostyled Reports, Nov. 23, 1951, which was followed by the West African Court of Appeal in the present case, and which overruled *In re the Estate of Frederick Akindele Somefun* (1941) 7 W.A.C.A. 156, approved.

Judgment of the West African Court of Appeal affirmed.

APPEAL (No. 19 of 1953) from a judgment of the West African Court of Appeal (June 2, 1952), in a matter relating to the distribution of the estate of John St. Matthew Daniel (hereafter referred to as the deceased), who died at Lagos on April 25, 1948, intestate. The Administrator-General of Nigeria was appointed administrator of the estate by order of the Supreme Court of Nigeria made on February 1, 1949.

The following facts are taken from the judgment of the Judicial Committee: The history of the matter was as follows. The deceased was the son, born posthumously, of Matthew Joaquim Daniel and Theresa Maria, who were married in a Wesleyan Methodist church in Lagos on September 28, 1890.

That was a marriage under the Marriage Ordinance, 1884, of the Colony of Lagos, which applied to any person subject to native law and custom who contracted a marriage in accordance with the provisions of the Ordinance. The deceased was the only child born of the marriage. The deceased's parents had another son, Pedro, who was born, out of wedlock, in 1884. Pedro appeared to have entered into a Christian form of marriage at Lagos in 1909. It was claimed by the appellant that Pedro became legitimated in 1929 by virtue of the Legitimacy Ordinance of Nigeria of 1929, which introduced the principle of legitimation per subsequens matrimonium and applied it to marriages contracted both before and after the date of the Ordinance. Pedro died in 1936. The appellant claimed to be the only child of Pedro's marriage. The deceased was said to have entered into nine polygamous marriages in accordance with native law and custom, and the respondents (other than the Administrator-General) claimed, as issue of those polygamous marriages, to be legitimate children of the deceased under Nigerian law. It would appear, and was assumed at the hearing, that all the persons mentioned were at all material times domiciled in Nigeria. The contest in this appeal lay between the appellant who claimed as lawful nephew of the deceased to succeed to the whole of the estate, and respondents who claimed, as children of the deceased procreated by polygamous marriages, to exclude him.

In the Supreme Court of Nigeria at Lagos, Robinson J., on May 17, 1951, made orders for distribution of the estate among the deceased's children. On appeal by the present appellant the West African Court of Appeal (Sutton P., de Comarmond Ag.C.J. (Nigeria) and Coussey J.A.) on June 2, 1952, allowed the appeal on the ground that there was insufficient evidence before the trial judge to justify his assumption that the 12 children concerned were issue of marriages with the deceased and remitted the respondents' motions for distribution of the estate to the court below for hearing de novo. The Court of Appeal further directed that the court below should require the respondents to adduce evidence sufficient to satisfy it on the following matters: (1) Whether the mothers of the 12 respondents were married to the intestate John St. Matthew Daniel, in accordance with the native law and custom applicable in each case. (2) Whether the respondents, or any of them, were the issue of such marriages; and if so, of which such marriages; and (3) whether by the native law and custom applicable in each case the respondents, or any of them, had the status of legitimate children.

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The appellant was allowed to be joined as opposer to the respondents' motions.

In so doing it was clear from the judgment of the Court of Appeal that they rejected a claim by the appellant to oust the respondents from any share in the estate even if they were legitimate issue of polygamous marriages by the deceased. The appellant accordingly applied for leave to appeal against the judgment of the Court of Appeal to Her Majesty in Council, which leave was granted by the Court of Appeal on October 6, 1952.

The Lagos Marriage Ordinance, No. 14 of 1884 (Laws of the Colony of Lagos, 1901 ed., vol. 1), provides:—

S. 2: "This Ordinance shall extend to the whole of the Colony "and the Protected Territories."

S. 37: "Any person who is married under this Ordinance, or "whose marriage before the commencement of this Ordinance is "declared by this Ordinance to be valid, shall be incapable during "the continuance of such marriage of contracting a valid marriage "under any native law or custom, but save as aforesaid, nothing "in this Ordinance contained shall affect the validity of any "marriage contracted under or in accordance with any native law "or custom, or in any manner apply to marriages so contracted."

S. 41: "Where any person who is subject to native law or "custom contracts a marriage in accordance with the provisions of "this or of any other Ordinance relating to marriage, or has con-"tracted a marriage prior to the passing of this Ordinance, which "marriage is validated hereby and such person dies intestate, "subsequently to the commencement of this Ordinance, leaving "a widow or husband or any issue of such marriage; and also "where any person who is issue of any such marriage as aforesaid "dies intestate subsequently to the commencement of this "Ordinance, the personal property of such intestate and also "any real property of which the said intestate might have dis-"posed by will shall be distributed in accordance with the "provisions of the law of England relating to the distribution of "the personal estates of intestates, any native law or custom to "the contrary notwithstanding. Provided always, that where by "the law of England, any portion of the estate of such intestate "would become a portion of the casual hereditary revenues of "the Crown such portion shall be distributed in accordance with "the provisions of native law and custom and shall not become a "portion of the said casual hereditary revenues. Provided also "that real property, the succession to which cannot by native "law or custom be affected by testamentary disposition shall "descend in accordance with the provisions of such native law "or custom anything herein to the contrary notwithstanding. "Before the Registrar of Marriages issues his certificate in the "case of an intended marriage, either party to which is a person "subject to native law or custom, he shall explain to both parties "the effect of these provisions as to the succession to property "as affected by marriage."

Interpretation Ordinance, 1930 (Laws of Nigeria, 1948 Rev., c. 94), s. 37: "(*b*) words in the singular shall include the plural, "and in the plural shall include the singular."

1954. July 14, 15. *Henry Salt Q.C.* and *A. J. Belsham* for the appellant. The intestate falls within the second limb of section 41 of the Marriage Ordinance of 1884—as issue of a marriage under that Ordinance who died intestate—and on the facts it is now common ground that the re-enacted Nigerian Marriage Ordinance of 1914 and the Nigerian Interpretation Ordinance, 1939 (transposing singular and plural) have no application. The law of the intestate's domicile has by the Ordinance of 1884 imported by reference "the provisions of the law of "England relating to the distribution of the personal estates of "intestates, any native law or custom to the contrary notwith-"standing," in cases of deaths intestate of persons who marry under the Ordinance and of the issue of such a monogamous marriage. That law consisted in 1884 of the Statute of Distributions, 1670 (22 & 23 Car. 2, c. 10) and the Act of 1685 (1 Jac. 2, c. 17), and the Statute of Frauds, 1677 (29 Car. 2, c. 3), which provided one-third for the wife and two-thirds for the children, and subject thereto for brothers and sisters or their issue. It is significant that Lord Brougham's Act (13 & 14 Vict. c. 21), the first precursor of the Interpretation Act, 1889 (52 & 53 Vict. c. 63), applied only to enactments after 1850, and therefore "wife" cannot or should not be read "wives" in the Statute of Distributions. It would be contrary to common law and to the canons of construction in those circumstances to read "wife" as "wives."

The West African Court of Appeal side-stepped the difficulty of the wives by stating that they had not formally claimed. But the Administrator-General is bound to take notice of rights of which he has notice and it was wrong to ignore them. Their existence has great relevance to the construction of the Marriage

Ordinance of 1884 incorporating the English Statute of Distributions, because there can be no certainty in working out its application when more than one " wife " survives. Should the distribution be by families, each wife taking a third of a family share and the children by her (if any) two-thirds? Or should the wives take a third of the estate between them, and if so, as joint tenants or tenants in common, and all the children two-thirds of the estate equally per capita? The latter adaptation of the English Statute of Distributions to a polygamous intestate's estate was adopted without any authority or justification in the Straits Settlements, but the Privy Council carefully left the point open and decided only the issue of what marriage formalities were required in regard to primary and secondary marriages in the Straits Settlements: see *Cheang Thye Phin* v. *Tan Ah Loy* [1] and *Khoo Hooi Leong* v. *Khoo Hean Kwee.*[2] It required a statute to regularize this practice of the Straits Settlements courts: Distribution Enactment, 1930, Laws of Federated Malay States, 1935 ed., c. 71. In the present case there is no Nigerian statute resolving the doubt. And in truth the Ordinance of 1884 cannot be applied at all to the case of an intestate leaving more than one widow.

The Marriage Ordinance of 1884 on its true construction shows an underlying intention that once there has been a monogamous marriage, any child (or remoter issue) thereof who lapses into polygamy, though he may lawfully do so, runs the risk that if he elects not to make a will his collaterals and not the wives and issue of his polygamous unions will succeed to his property by virtue of the Ordinance. Even before the Ordinance was passed the courts of Nigeria attached to monogamous and Christian marriages a sanctity not accorded to polygamous unions by native law and custom.

The same law of the domicile—the Legitimacy Ordinance, 1929, Laws of Nigeria, 1948 ed., vol. 4, c. 3—legitimated the appellant's father as from 1929, though not in time to enable him to participate with his brother, the intestate, in their father's estate on its distribution in 1890. The appellant is the collateral of the intestate now entitled to the intestate's estate under the Ordinance of 1884 to the exclusion of the polygamous wives and issue of the intestate. [*Knowles* v. *Attorney-General* [3] was referred to.]

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[1] [1920] A.C. 369, 373.

[2] [1926] A.C. 529.

[3] [1951] P. 54; 66 T.L.R. (Pt. 1) 1188.

There has been conflict in the West African Court of Appeal decisions in this connexion. *In re the Estate of Somefun*,[4] a case indistinguishable from the present one, decided in favour of collaterals to the exclusion of wives and issue of polygamous unions. *In re the Estate of Macaulay*,[5] a similarly indistinguishable case, decided the converse, setting aside one-third of the estate to satisfy widows. It was there held that *Somefun's* case [6] had been decided per incuriam. In the present case the court followed its decision in *Macaulay's* case,[7] but ignored widows. It is submitted that *Somefun's* case [8] was right, and that *Macaulay's* case [9] and the present decision were wrong. In the latter the West African Court of Appeal purported to follow *In re Goodman's Trusts*,[10] but that case and *In re Bischoffsheim* [11] are distinguishable. Status is a bundle of incidents. One or more of the incidents may be lacking although the label of the status in question remains. Here the court was concerned with the incident of qualification to participate in the distribution of an estate. And for the purposes of the Nigerian Marriage Ordinance the intestate's widows and issue of his polygamous unions lack that qualification, irrespective of whether during his lifetime they properly bore the labels of lawful wife and lawful issue according to native law and custom. From *In re Goodman's Trusts* [12] and *In re Bischoffsheim* [13] it is a long step to treat this intestate's widows and issue as qualified to participate under the Ordinance of 1884. It is begging the question to say in general terms that by the general law of Nigeria they are lawful wives and lawful issue.

Notwithstanding the South African case of *Seedat's Executors* v. *The Master (Natal)*,[14] the qualification to participate of the respondent children must stand or fall with that of the widows, and it is submitted this must fall. The *Sinha Peerage* case [15] is distinguishable: it concerned a dignity and turned on the particular fact that the first Lord Sinha's marriage, though potentially polygamous, was in fact and on every reasonable prospect monogamous. Legislation is pending in India which will discourage polygamy. But the appellant's case here is not rested on public policy; it turns on the construction of the Nigerian Ordinance of 1884, which imports into the law of Nigerian domicile English statutory law of distribution where there has been a monogamous marriage. The imported law is unworkable if applied to polygamous unions. [Reference was also made to *Warrender* v. *Warrender*,[16] *Hyde* v. *Hyde*,[17] *In re Bethell*[18] and *In re Don's Estate*.[19]]

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[4] (1941) 7 W.A.C.A. 156.

[5] (1951) Cyclostyled Reps., Nov. 23, 1951.

[6] 7 W.A.C.A. 156.

[7] Cyclostyled Reps., Nov. 23, 1951.

[8] 7 W.A.C.A. 156.

[9] Cyclostyled Reps., Nov. 23, 1951.

[10] (1881) 17 Ch.D. 266.

[11] [1948] Ch. 79; 64 T.L.R. 36; [1947] 2 All E.R. 830.

[12] 17 Ch.D. 266.

[13] [1948] Ch. 79.

[14] [1917] S.A.L.R.(A.D.) 302, 310.

[15] [1946] 1 All E.R. 348.

A. J. Belsham following. Legitimacy may have a wider or a narrower meaning. In Nigeria there are two classes of legitimate children, issue respectively of monogamous and polygamous marriage. In section 41 of the Ordinance of 1884 the former and narrower meaning is intended throughout. Certain Nigerian cases, beginning with *Cole* v. *Cole*,[20] show special consideration for the issue of monogamous and Christian marriages. The same tendency appears in certain other Nigerian Ordinances, such as the Supreme Court Ordinance of 1876, section 19. [Reference was also made to *Adegbola* v. *Folaranmi and Others*,[21] *Haastrup* v. *Coker*[22] and *Coker* v. *Coker*.[23]]

Lionel Edwards Q.C., *H. Bruce Campbell* and *F. R. A. Williams* for the respondents were not called upon to argue, but submitted that, if the appeal were dismissed, in the circumstances costs should be paid by the appellant.

Henry Salt Q.C. said that costs were in the discretion of the Board, and submitted that in this case which, after all, was one of settling the law, costs should come out of the estate.

July 15. LORD MORTON OF HENRYTON announced that their Lordships would humbly advise Her Majesty that the appeal should be dismissed and that they would give their reasons later.

October 12. Their Lordships' reasons for dismissing the appeal were delivered by LORD KEITH OF AVONHOLM, who stated the facts set out above and continued: The question at issue arises under the Marriage Ordinance of the Colony of Lagos of 1884. In the West African Court of Appeal it was assumed that the succession was governed by the Marriage Ordinance of Nigeria of 1914. It is now agreed between the parties that it is the Ordinance of 1884 that falls to be considered, and it appears to their Lordships that this must be so as the marriage of the deceased's parents was contracted under that Ordinance. There is no material difference in the language of the two Ordinances on any point affecting this appeal. It was at one time indicated by an amendment made by the respondents to their pleadings, and allowed by their Lordships, that the respondents intended to argue, as an alternative to their main submission, that the relevant section of the Marriage Ordinance did not apply to the deceased. In the end counsel for the respondents did not see his way to submit any argument in support of this amendment. Their Lordships accordingly proceed on the view which has been accepted throughout this case, that the succession to the deceased's estate turns upon an interpretation of the relevant provisions of the Marriage Ordinance, 1884.

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[16] (1835) 2 Cl. & F. 488.

[17] (1866) L.R. 1 P. & M. 130.

[18] (1888) 38 Ch.D. 220; 4 T.L.R. 319.

[19] (1857) 4 Drew. 194.

[20] (1898) 1 Nig.L.R. 15.

[21] (1921) 3 Nig.L.R. 81.

[22] (1927) 8 Nig.L.R. 68.

[23] (1943) 17 Nig.L.R. 55.

Section 41 of the Marriage Ordinance of 1884 is as follows: [His Lordship read the section and continued:] From what has been said at the outset of this judgment it follows that the deceased falls within the second category of intestate, being a person who was the child of a marriage contracted under the Ordinance. The short question is, what is the effect of the direction that his disposable estate shall be distributed in accordance with the provisions of the law of England relating to the distribution of the personal estates of intestates, any native law or custom to the contrary notwithstanding?

The relevant law of England in 1884 is to be found in the Statute of Distributions, 1670 (22 & 23 Car. 2, c. 10) and the Act of 1685 (1 Jac. 2, c. 17). For purposes of this appeal their Lordships are concerned only with the direction in the Statute of Distributions dealing with the succession of children of an intestate. The appellant's contention is that this law precludes the succession on intestacy of children or others who cannot claim kinship with the deceased through monogamous marriage; that the respondent claimants being the offspring of polygamous marriages fall to be regarded as illegitimate under the English Statute of Distributions, and that he, the appellant, being the only person who can claim kinship with the deceased through monogamous marriage, is entitled to the whole estate. This ignores one factor, that the appellant's father, the brother of the deceased, was the issue of an illicit union and was only legitimated in 1929 by a statute of the Nigerian Colony, so that the appellant would have to rely on the law of his father's domicile for the purpose of bringing himself within the class of legitimate heirs. This point was not, however, adumbrated in the courts below, and owing to the course which the hearing took before their

Lordships was not developed in argument before their Lordships' Board. On the view on which this judgment proceeds their Lordships have found it unnecessary to deal with this point, to which special considerations may apply. Accordingly, they do not refer further to this matter.

The contention for the respondent children is that by the law of their domicile of origin they are legitimate children of the deceased and accordingly come within the class of persons entitled to succeed under the English Statute of Distributions. This view has been upheld by the West African Court of Appeal, subject to the respondents establishing their status of legitimacy.

This question has been the matter of some conflict of decision in the Nigerian courts. It was very fully and clearly considered in *In re the Estate of Herbert Samuel Heelas Macaulay, decd.*,[1] by the West African Court of Appeal in a judgment delivered on November 23, 1951, by Sir John Verity C.J., and concurred in by the two other members of the court, which decided in favour of children of polygamous unions. In the present case Sir Stafford Foster Sutton, President of the Court of Appeal, who delivered the judgment of the court, followed this decision, adding that he found himself "in entire agreement with that portion of the "Chief Justice's judgment which touches the issue with which "we are concerned on this appeal." These judgments overruled a previous decision in a contrary sense in *In re the Estate of Frederick Akindele Somefun.*[2]

Reference was also made by counsel for the appellant to a number of decisions in the Nigerian courts, commencing with *Cole* v. *Cole*,[3] where, in the case of marriages contracted under the rites of a Christian church, to which for one reason or another the provisions of a marriage Ordinance did not apply, the courts held that the parties must be taken to have intended their succession on intestacy to be regulated by English law, not by native law and custom. Their Lordships have carefully considered these cases, but cannot extract from them any principle that would affect the present case. They find it unnecessary to decide whether the courts were right in applying the English law of succession or whether if English law was applicable it was rightly applied in the circumstances of the particular cases.

Their Lordships would observe that no question can arise as to the capacity of the deceased to enter into polygamous marriage by his local law. He himself was the child of a monogamous marriage, but that was no impediment to his contracting a marriage by native law and custom. Even a person who has himself contracted a monogamous marriage under the Ordinance is by section 37 of the Ordinance prohibited from contracting a valid marriage under any native law or custom only during the continuance of the monogamous marriage. If, then, the respondent children are found to have been from birth legitimate children of the deceased the only question with which their Lordships are concerned is whether they are entitled to share in the succession of the deceased under the Statute of Distributions.

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[1] (1951) Cyclostyled Reps., Nov. 23, 1951.

[2] (1941) 7 W.A.C.A. 156.

[3] (1898) 1 Nig.L.R. 15.

Their Lordships entertain little doubt that under what are now well-accepted principles recognized by the English courts no ground exists, in circumstances like the present, for excluding the respondents from taking their rights of succession if they are legitimate children of the deceased under the law of their domicile. In *In re Don's Estate*,[4] Kindersley V.-C., dealing with the status of a child born in Scotland of a father domiciled there and legitimated by the subsequent marriage of his parents, said: "It "appears to me that on the authorities applicable to this question, "the principle is this: that the legitimacy or illegitimacy of any "individual is to be determined by the law of that country which "is the country of his origin. If he is legitimate in his own "country, then all other civilized countries, at least all Christian "countries, recognize him as legitimate everywhere. Questions "may arise, and have arisen, whether the law which is to determine the legitimacy or illegitimacy, is the law of the country "where the individual was born, or the law of the country where "the parents intermarried, or the law of the country of the "domicile of the parents? And if the domicile of the parents "was different, whether the law of the father's or mother's "domicile governs? If it were necessary for me to determine "these questions I should hold that the law of the father's "domicile governed." None of the special questions referred to in this passage arise here for, as their Lordships apprehend, all the circumstances concur to fix Nigeria as the domicile of the parents, the place of their marriages, and the place of birth of the children. This, and similar expressions of opinion in earlier cases, were no doubt given in cases dealing with the institution of monogamous marriage. But more recent authority shows that the principle cannot be confined within so narrow a field. (See the opinion of Lord Maugham in the *Sinha Peerage Claim* case[5] and the opinion of Lord Greene M.R. in *Baindail* v. *Baindail.*[6]) Their Lordships' Board have also on various occasions had regard to and acted on the application of the Statute of Distributions to Chinese successions in the Straits Settlements, arising from polygamous unions. (See *Cheang Thye Phin* v. *Tan Ah Loy*[7]; *Khoo Hooi Leong* v. *Khoo Hean Kwee*[8]; *Khoo Hooi Leong* v. *Khoo Chong Yeok.*[9])

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[4] (1857) 4 Drew. 194, 197.

In their Lordships' opinion the West African Court of Appeal has reached a right conclusion on the law applicable in this case. *In re Goodmans Trusts*,[10] on which that court in the case of *Macaulay's Estate*[11] largely proceeded, was a case under the Statute of Distributions in which it was held by a majority of the Court of Appeal that a child born in Holland, where her parents were at the time domiciled, who had been legitimated under Dutch law by the subsequent marriage of the parents there, was entitled to share as a "brother's child" under the Statute of Distributions. As already indicated, their Lordships cannot hold that the principle of this decision is restricted to the case of monogamous marriage. Cotton L.J. said in that case[12]: ". . . I "am of opinion that if a child is legitimate by the law of the "country where at the time of its birth its parents were domiciled, "the law of England, except in the case of succession to real "estate in England, recognizes and acts on the status thus "declared by the law of the domicile." And James L.J. said[13]: "It must be borne in mind that the Statute of Distributions is not "a statute for Englishmen only, but for all persons, whether "English or not, dying intestate and domiciled in England, and "not for any Englishman dying domiciled abroad. . . . And, "as the law applies universally to persons of all countries, races, "and religions whatsoever, the proper law to be applied in determining kindred is the universal law, the international law, "adopted by the comity of States. The child of a man would "be his child so ascertained and so determined." The decision and reasoning of the majority in that case has not, so far as their Lordships are aware, been questioned in any subsequent case.

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[5] Journals of the House of Lords, 1939, Vol. 171, p. 350.

[6] [1946] P. 122; 62 T.L.R. 263; [1946] 1 All E.R. 342.

[7] [1920] A.C. 369.

[8] [1926] A.C. 529.

[9] [1930] A.C. 346.

[10] (1881) 17 Ch.D. 266.

[11] Cyclostyled Reps., Nov. 23, 1951.

[12] 17 Ch.D. 266, 292.

[13] Ibid. 300.

It proceeds in their opinion on sound principle and gives a meaning and effect to the Statute of Distributions wider than it would have under the purely domestic law of England.

In the present case the Statute of Distributions is a statute applying to a limited class of persons domiciled in Nigeria. As a matter of construction and on the authorities referred to it cannot in their Lordships' opinion be limited in its local application to children who are the issue of monogamous unions. The effect of the application of the statute in the cases to which it applies is to fix the order of succession according to a table different from that prevailing under native law and custom, leaving it to the courts to determine in accordance with the principles indicated who are the particular individuals who fall within any particular class in the succession table.

It was contended for the appellant that the Statute of Distributions could not be applied to polygamous unions because of the difficulty of applying its provisions to a plurality of wives. The West African Court of Appeal observed that no claim had been put forward in this case by any person as a widow of the deceased, and their Lordships propose to say nothing as to what rights, if any, widows would have in the event of a claim being made. They cannot, however, agree with the appellant's submission. Whatever difficulties may arise in the case of the mothers of the children, the claims of the children as lawful children of the deceased must, in their Lordships' opinion, be considered independently. This may be so in some cases even in questions of status. In a judgment of the Board in *Khoo Hooi Leong* v. *Khoo Hean Kwee*,[14] where the claim of a child to be legitimate by the law of a community in which polygamy was recognized and practised was considered, Lord Phillimore, who delivered the judgment of the Board, said [15]: "In deciding upon "a case where the customs and the laws are so different from "British ideas a court may do well to recollect that it is a possible "jural conception that a child may be legitimate, though its "parents were not and could not be legitimately married. This "principle was admitted by the canon law which governed "western continental Europe till about a century ago and "governed still later, if it does not govern still, the countries of "Spanish America." Two other cases may be mentioned. In *Seedat's Executors* v. *The Master (Natal)*,[16] the Supreme Court of

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[14] [1926] A.C. 529.

[15] Ibid. 543.

[16] [1917] S.A.L.R.(A.D.) 302.

South Africa held, in a learned judgment by Sir James Rose-Innes C.J., that they could not recognize as valid in Natal a polygamous marriage of the deceased entered into in India before he became domiciled in Natal, but that the children of this marriage, who were all born in India while their parents were domiciled there, were entitled to be treated as legitimate children. Accordingly, while the widow was not entitled to exemption in the matter of succession duty but, on the contrary, was liable to the rate appropriate to a stranger in blood, the rate of duty attributable to the children's share of the succession was held to be that borne by lawful children of a testator. Again in *In re Bischoffsheim* [17] Romer J. had to consider the question of the legitimacy for the purposes of succession under the will of an English testator of a child born in New York of English parents who were domiciled in New York at the time of the child's birth. A question might have been raised as to the validity of the parents' marriage under English law, but in holding that the child was legitimate by the law of New York at the time of his birth and therefore entitled to be treated as a lawful child of his mother under the will, Romer J. adopted the view [18] "that where succession to personal property "depends on the legitimacy of the claimant, the status of "legitimacy conferred on him by his domicile of origin (i.e., the "domicile of his parents at his birth) will be recognized by our "courts; and that, if that legitimacy be established, the validity "of his parents' marriage should not be entertained as a relevant "subject for investigation." It would be a strange result that in the converse case where a marriage of the parents was recognized as valid the children should be deprived of their rights of succession because of a difficulty in working out the rights of the wife.

In their Lordships' view the West African Court of Appeal reached a right conclusion. They have accordingly humbly advised Her Majesty to dismiss the appeal. The appellant must pay the costs of the respondents other than the Administrator-General, who was not represented before the Board.

Solicitors: *Rexworthy, Bonser & Wadkin; Hatchett Jones & Co.*

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[17] [1948] Ch. 79; 64 T.L.R. 36; [1947] 2 All E.R. 830.

[18] [1948] Ch. 92.

EBENEZER THEODORE JOSHUA . . APPELLANT;

AND

THE QUEEN . . . . RESPONDENT.

J. C.*

1954
Dec. 7.

ON APPEAL FROM THE COURT OF APPEAL FOR THE WINDWARD ISLANDS AND LEEWARD ISLANDS.

Windward and Leeward Islands—Criminal law—Public mischief—No conspiracy—Alleged false statements concerning police in public speech—Whether for judge or jury to consider if words constituted offence—Undesirability of counts charging both sedition and public mischief by same speech—Conviction quashed—Costs.

Criminal Law—Public mischief. Sedition.

The appellant was charged with "effecting a public mischief "contrary to the common law" by agitating and exciting certain sections of the public against the police to the prejudice and expense of the community "by means of certain false statements in a "public speech to the effect that the police were scheming politically "and storing up a veritable arsenal at headquarters to shoot down "the people when they decide to fight for their rights." In his charge to the jury the trial judge said: "I direct you, as a matter "of law, that if you find that he did utter the words complained "of, he is guilty of the offence of effecting a public mischief." The appellant was convicted on the public mischief charge, but acquitted on a charge of sedition in respect of the same speech:—

Held, that it was a misdirection to tell the jury as a matter of law that they must convict the appellant if they found that he had spoken the words alleged. It was for the judge to direct the jury as to the elements of the crime of effecting a public mischief (assuming that such a crime existed) and to direct them on the facts, and it was for the jury—who were the sole judges of the facts —to find whether the appellant was guilty on those facts.

Rex v. *Brailsford* [1905] 2 K.B. 730, 746–7; 21 T.L.R. 727 considered.

It was highly undesirable that an accused person should be tried on counts charging that he made a seditious speech and also that he effected a public mischief by making the same speech. The result of that having been done in this case was that the jury found the appellant not guilty of sedition but guilty of effecting a public mischief by making a speech the mischief of which was its allegedly seditious nature.

There were no such circumstances here as to justify a departure from the ordinary rule of the Board in criminal cases that there would be no order as to costs.

Judgment of the Court of Appeal for the Windward Islands and Leeward Islands reversed.

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* *Present*: LORD OAKSEY, LORD KEITH OF AVONHOLM and MR. L. M. D. DE SILVA.

J. C.
1954

Joshua
v.
The Queen.

Appeal (No. 1 of 1954), by special leave, from a judgment of the Court of Appeal for the Windward Islands and Leeward Islands (July 7, 1953) dismissing an appeal from a conviction and judgment of the Supreme Court of the Windward Islands and Leeward Islands (January 16, 1953) whereby the appellant was convicted of effecting a public mischief and was discharged conditionally upon entering into a recognizance to be of good behaviour and to appear for sentence when called on at any time within two years.

The appellant was indicted on three counts, the first and third charging sedition, and the second charging a public mischief. On the first count the jury failed to agree, and were discharged from returning a verdict; on the third count the appellant was acquitted. The second count read as follows:—

"Statement of Offence.

"Effecting a public mischief, contrary to the common law.

"Particulars of Offence.

"Ebenezer Theodore Joshua on the 26th day of November, "1952, at Kingstown in the Colony of Saint Vincent, did by "means of certain false statements in a public speech to the "effect that the police were scheming politically and storing up "a veritable arsenal at headquarters to shoot down the people "when they decide to fight for their rights, agitate and excite "certain sections of the public against the police, to the prejudice "and expense of the community."

The common law of England relating to criminal matters prevailed in St. Vincent.

The following evidence relevant to the second count was given for the respondent. In a speech made by the appellant in the Market Square at Kingstown on November 26, 1952, and in other speeches made by the appellant on November 12 and 20, 1952, he had said, inter alia: "For this reason, the policemen are "storing up a veritable arsenal in the Headquarters. They are "storing up this arsenal to shoot you down when you decide to "fight for your rights. I have on many occasions pointed out "the seriousness of making the people of this island bitter against "one another and it is again happening in our midst. That is "why they are storing up this arsenal and with that, Charles, "Slater, and all the rest are joining in the plot. They have a "veritable arsenal to shoot you down like dogs."

* * * * *

"I am asking about all these number of wrongs going on in "our midst; the police taking political sides, heaping up a large "arsenal to shoot you and destroy you; the Councillors whom "you elected not caring for you and things of that nature."

Evidence was also given that there was no truth in the allegation that the police were storing up arms. Arms were kept primarily for the protection of the colony, because the police were liable to be called out for full military service.

The appellant neither gave evidence nor made a statement, and called no witnesses. His counsel submitted that comment about the conduct of a public officer could not be said to tend to create public mischief. The judge rejected that submission.

In his charge to the jury, the judge (Cools-Lartigue J.), after dealing with the facts, directed the jury as follows: "The "authorities also clearly establish that it is for the jury to find "whether the accused committed the acts alleged against him. "In this case whether he said these words! It is for the judge "to rule whether those acts, if proved, do or do not constitute "the effecting of a public mischief. Holding as I do that the "words complained of, in the context in which they are found, "can only be construed as an attempt to bring the police into "disrepute and to cause a certain section of the community to "suspect, disrespect and, in all probability, to hate the police. "I direct you, as a matter of law, that if you find he did utter "the words complained of, he is guilty of the offence of effecting "a public mischief."

The jury returned a verdict of guilty on the second count by eight to one.

The appellant appealed to the Court of Appeal for the Windward Islands and Leeward Islands (Jackson C.J., Date and Manning JJ.). His notice of appeal, dated January 24, 1953, raised the following points of law: (i) that the indictment was bad for various reasons; (ii) that the judge had misdirected the jury about the relevance to the first and third counts of evidence supporting the second count; (iii) that the evidence supporting the second count did not constitute the offence of public mischief; (iv) that the verdict on the second count was unreasonable in view of the verdict on the first and third counts.

The judgment of the Court of Appeal was delivered on July 7, 1953. Having set out the indictment and described the course of the trial, the judges held that no complaint could be based on the suggestion that the words which formed the subject of the second count were also part of the words which formed the subject of the first count. In fact, the two counts were founded on different parts of the one speech, and Cools-Lartigue J. had specifically and clearly directed the jury as to the particulars on the second count. The judges quoted the statement of Lord Caldecote L.C.J. in *Rex* v. *Young*[1] that "offences which tend to the "prejudice or which cause expense to the public justify charges "under the common law of misdemeanour of causing a public "mischief." They quoted Cools-Lartigue J.'s direction that the appellant, if he uttered the words alleged, was guilty of effecting a public mischief, and said that it was settled law that the question whether an act might tend to the public mischief was for the judge, and was not an issue of fact on which evidence might be given. It did not matter, they said, that there had been no evidence of expense to the community, because the offence could be constituted either by prejudice or by expense to the public. The words "and expense" in the second count were surplusage. They said that the direction of the judge was right. Accordingly, they dismissed the appeal.

1954. Nov. 3, 4, 8, 9. *Ralph Millner* for the appellant. The submissions fall under four heads. (1) The appellant was convicted of an offence unknown to the common law, for although the offence of persons combining or conspiring to effect a public mischief was clearly known to the law, the alleged offence of effecting a public mischief by an individual alone was unknown to the common law. (2) On any view of the law, this speech on the face of it was no offence. (3) The trial judge misdirected the jury as to the application of the law to the facts. (4) He decided certain facts himself which he ought to have left to the jury. With regard to the first proposition, there is no question, and it is common ground, that the common law of England applies under the relevant local Ordinances. The conviction was based on a statement of the trial judge in his summing-up where he said: "It has been held that all offences of a public nature tending to "the prejudice of the community justify a charge of causing a "public mischief." That is plainly a reference to the dictum of Soulden Lawrence J. in *Rex* v. *Higgins*,[2] but that statement was obiter, and the question of public mischief never arose in that case. In a further passage in his summing-up the judge said that "in a comparatively recent case it was held that making false

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[1] (1944) 30 Cr.App.R. 57, 60.

[2] (1801) 2 East 4.

"statements to the police and thus causing them to take action "thereon tended to cause a public mischief." That refers to *Rex* v. *Manley*,[3] and that case is an obstacle which has to be removed from the appellant's path—it is plainly against him. In the argument in that case, however, no distinction was drawn between the effecting of a public mischief by means of conspiracy and by an individual, so that the point was not present to the minds of the Court of Criminal Appeal. The main weapon with which it is sought to demolish the obstacle presented by *Rex* v. *Manley* [3] are the observations by Lord Goddard C.J. in *Reg.* v. *Newland* [4]: "We believe that the right approach to what may "be compendiously called public mischief cases is to regard them "as part of the law of conspiracy, and to hold the actions of an "individual not committed in combination with others as indict-"able only if they constitute what has been held in the past "to be common law or statutory offences." The submissions on this first proposition are taken very much further by several cases which demonstrate that Lord Goddard was right: *Rex* v. *Brailsford* [5]; *Rex* v. *Porter* [6]; *Rex* v. *Bassey* [7]; *Rex* v. *Young*.[8]

[LORD OAKSEY referred to Archbold's Criminal Pleading, Evidence and Practice, 32nd ed., p. 1446.]

If the observations of Lord Goddard in *Newland's* case [9] are right, it would seem that the author of Archbold has slipped into the same error of law as did the court in *Manley's* case,[10] and did not consider the case where there is a conspiracy and where there is not. As a matter of cold logic it may be difficult to say why there should be a distinction; but the common law does in fact draw the distinction. Some reliance is also placed on Stephen's History of the Criminal Law (1883), vol. 3, pp. 358–9, and an article on "Public Mischief" by Dr. Stallybrass in The Law Quarterly Review, vol. 49, p. 183, where he said at p. 187: "It "is submitted that the dictum of Soulden Lawrence J. [in *Rex* v. "*Higgins* [11]] cannot be taken as binding authority at the present "day." The line of cases to which Dr. Stallybrass refers, where this question of public mischief arose, were "cheat" cases. [Reference was made to *Reg.* v. *Price* [12]; *Rex* v. *Wheatley* [13];

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[3] [1933] 1 K.B. 529; 49 T.L.R. 130.

[4] [1954] 1 Q.B. 158, 168.

[5] [1905] 2 K.B. 730; 21 T.L.R. 727.

[6] [1910] 1 K.B. 369; 26 T.L.R. 200.

[7] (1931) 47 T.L.R. 222; 22 Cr. App.R. 160.

[8] 30 Cr.App.R. 57.

[9] [1954] 1 Q.B. 158, 168.

[10] [1933] 1 K.B. 529.

[11] 2 East 4.

[12] (1884) 12 Q.B.D. 247.

[13] (1761) 2 Burr. 1125.

Reg. v. *Daniell*[14]; *Treeve's* case[15]; *Rex* v. *Dixon.*[16]] Admittedly, none of those cases deals with the difference between conspiracy and no conspiracy; but they are not dealing with public mischief simpliciter but with cheat, and the question whether they can be indicted depends on whether it is public or private. There is not a single case in which it is said that public mischief simpliciter and apart from conspiracy is an indictable offence. [Reference was also made to the note by Professor Goodhart on p. 153 of vol. 49 of The Law Quarterly Review.]

The second submission, which must be on the footing that the Board reject the first, is that on any view of the law—on that expressed in *Rex* v. *Manley*[17]—no offence was committed here. Even if the offence of public mischief does exist apart from conspiracy, it does not apply to restrict freedom of speech. There must be some limit to the nature or type of acts which can be the subject of this offence. In general terms, supposing that conspiracy is not a necessary element, there appears to be a common element throughout the cases, and that is fraud—deceit—in its broad sense, and that is something quite different from making a speech. Further, this particular speech itself was not on any view of the law a public mischief; it amounted to no more than the legitimate exercise of the appellant's liberty to comment publicly upon matters of general public interest and, the jury not having convicted him on the charge of sedition based on the same speech, the case against him on the public mischief count ought to have been dismissed.

Thirdly, the judge misdirected the jury as to the application of the law to the facts: *Rex* v. *Brailsford.*[18] Where there is a speech which is ex hypothesi capable of different interpretations, it is pre-eminently a type of case in which the proper interpretation to be put upon the words said to have been used is essentially one for the jury. [Reference was made to the Encyclopedia of the Laws of England (1908), vol. 13, pp. 75–6; Laws of St. Vincent, 1926 Rev., vol. 1, p. 276 (Indictable Offences Ordinance, s. 4); *Rex* v. *Young.*[19]]

Finally, the judge decided certain questions of fact himself which he should have left to the jury, namely, whether the alleged statements about the police were false, and as to the proper interpretation of words alleged to have been used by the appellant which he ought to have left to be decided by the jury.

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[14] (1703) 6 Mod. 99.

[15] (1796) 2 East's Pleas of the Crown 821.

[16] (1814) 3 M. & S. 11.

[17] [1933] 1 K.B. 529.

[18] [1905] 2 K.B. 730.

[19] 30 Cr.App.R. 57.

J. G. Le Quesne for the Crown. Such slight misdirection as there may have been is not such as would cause this Board to interfere with the verdict: *Renouf* v. *Attorney-General for Jersey*[20]; *Rex* v. *Brailsford*[21]; *Reg.* v. *Price*.[22] Whether the act tends to a public mischief is a question of law. It is for the judge to direct the jury whether certain facts, if proved, constitute the offence of public mischief. In the present case the judge directed that certain words would constitute a public mischief and that, if the jury found that he had said them, he was guilty of the offence. The judge was right, for in *Rex* v. *Porter*,[23] *Rex* v. *Young*[24] and *Rex* v. *Brailsford*[25] the courts of this country have laid it down that the question whether an act tends to the public mischief is not one to be left to the jury; it has to be decided by the judge. In all the three last cited cases what the judge did was upheld on appeal. And it is further submitted that in the nature of this offence that in fact is the only way in which it can be done. *Reg.* v. *Price*[26] also shows that Stephen J. regarded it as still possible for the judge to lay down that an act never before treated as criminal was criminal.

It was said for the appellant that (a) whatever the state of the law, no offence has been committed here, and (b) even if there is an offence of public mischief by an individual, it cannot include the spoken word. It is submitted that the judge was perfectly justified in holding that what the appellant said did constitute public mischief; and it could be committed by saying something in a public speech. So far as Fox's Libel Act is concerned, it is submitted that it is not part of the law of St. Vincent either by virtue of the common law or statute, but even if it were it would not apply to this case because here there was no charge of publishing a libel. [*Capital and Counties Bank* v. *Henty*[27] was referred to.] There is no case in which the judge has ever said to a jury: " You will decide whether this act is sufficiently " mischievous to be a crime." The cases cited below show that long before the dictum of Lawrence J. in *Rex* v. *Higgins*[28] it was established that an act may be criminal because it tends to the prejudice of the public, even though it would not have been criminal apart from that tendency. They also show that this applies both to conspiracy and to acts of individuals: *Rex* v. *Sterling*[29]; *Reg.* v. *Daniell.*[30] The line of cases of which *Rex* v. *Wheatley*[31] is one—the "cheat" cases—are merely another example of the common law applying the test of whether or not an act tended to the public mischief. See also East's Pleas of the Crown, vol. 2, pp. 816 and 821 (*Treeve's* case). Certain frauds, not all, were also held criminal acts because of their public nature. Lawrence J. in *Rex* v. *Higgins*[32] was generalizing the doctrine which one extracts from the earlier cases; the process of development did not stop in 1801, and has never stopped: *Jeffreys* v. *Boosey.*[33] One sees the cases of *Brailsford,*[34] *Porter,*[35] *Manley*[36] and *Young*[37] as being parts of the continuous development, and *Rex* v. *Manley*[38] is directly in point and is right. What was said in *Newland's* case[39] can only be right if the public mischief itself is unlawful. One gets from these cases the principle on which the law has developed and continues to develop; it is indeed a principle which is to be qualified by considerations of degree, but there is nowhere to be found in the books any reason for limiting it in a way which would exclude words spoken in a speech.

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[20] [1936] A.C. 445; 52 T.L.R. 455; [1936] 1 All E.R. 936.

[21] [1905] 2 K.B. 730.

[22] 12 Q.B.D. 247, 255.

[23] [1910] 1 K.B. 369.

[24] 30 Cr.App.R. 57, 59.

[25] [1905] 2 K.B. 730.

[26] 12 Q.B.D. 247, 255.

[27] (1880) 5 C.P.D. 514, 539.

[28] 2 East 4.

It must be conceded that one is here in the presence of something which is rather anomalous when one considers the general system of the law, but it is undoubtedly the fact that there is no case at any period in which any judge has said to the jury, "you are to decide whether this act is sufficiently mischievous to "the public to be an offence"; it has always been decided by the judge and not by the jury.

The appeal should be dismissed. If it is to be allowed, there should be no order as to costs: *Waugh* v. *The King*[40]; *Teper* v. *The Queen.*[41] The locus classicus on this costs point is *Johnson* v. *The King.*[42] The mere fact that some mistake has occurred below is not enough to make an exceptional case.

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[29] (1677) 1 Lev. 126.

[30] 6 Mod. 99.

[31] 2 Burr. 1125.

[32] 2 East 4.

[33] (1854) 4 H.L.C. 815, 934.

[34] [1905] 2 K.B. 730.

[35] [1910] 1 K.B. 369.

[36] [1933] 1 K.B. 529.

[37] 30 Cr.App.R. 57.

[38] [1933] 1 K.B. 529.

[39] [1954] 1 Q.B. 158.

[40] [1950] A.C. 203; 66 T.L.R. (Pt. 1) 554.

[41] [1952] A.C. 480; [1952] 2 T.L.R. 162; [1952] 2 All E.R. 447.

[42] [1904] A.C. 817, 824; 20 T.L.R. 697.

Ralph Millner, in reply, referred to a number of the cases already cited and to Glanville Williams on Criminal Law (1953), section 168.

December 7. The judgment of their Lordships was delivered by LORD OAKSEY, who stated the facts set out above and continued: The following questions have been argued before their Lordships' Board: first, whether apart from cases of conspiracy there is any common law offence of effecting a public mischief; secondly, whether the judge's direction was right that the jury must as a matter of law find the appellant guilty if they found that he spoke the words charged; thirdly, whether the two offences of sedition and effecting a public mischief can be charged in respect of one speech; and fourthly, whether the appellant could be found guilty on an indictment charging that he did by false statements agitate and excite certain sections of the public when no evidence was given that any section of the public was agitated or excited by the appellant's speech.

The first question is one of general importance upon which there are conflicting views by judges of great eminence (e.g., Holt C.J., *Reg.* v. *Daniell*[1]; Mansfield C.J., *Rex* v. *Wheatley*[2]; Goddard C.J., *Reg.* v. *Newland*[3]; and Normand, Lord Justice-General, *Kerr* v. *Hill*[4]) but as it is not necessary to the decision of the present appeal their Lordships do not propose to deal with it.

On the second question their Lordships are of opinion that it was for the judge to direct the jury as to the elements of the crime of effecting a public mischief (assuming that such a crime exists) and to direct them on the facts if he thought that there was evidence to go to the jury, and it was for the jury to find whether the appellant was guilty upon those facts. It was a misdirection to tell the jury as a matter of law that they must convict the appellant if they found that he had spoken the words alleged. To do so was, in their Lordships' opinion, to usurp the function of the jury. It is true that there are some observations of Lord Alverstone C.J. in *Rex* v. *Brailsford*[5] which seem to suggest that the question whether the crime of public mischief had been committed is for the judge, but there are other passages

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[1] (1703) 6 Mod. 99, 100.

[2] (1761) 2 Burr. 1125, 1127–8.

[3] [1954] 1 Q.B. 158, 167–8; [1953] 2 All E.R. 1067.

[4] 1936 S.C.(J.) 71.

[5] [1905] 2 K.B. 730, 746–7; 21 T.L.R. 727.

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in the same judgment which make it clear that the court there recognized that there are cases in which the jury must find whether the accused is guilty on the facts proved. It is a general principle of British law that on a trial by jury it is for the judge to direct the jury on the law and in so far as he thinks necessary on the facts, but the jury, whilst they must take the law from the judge, are the sole judges on the facts. (See *Rex* v. *West*,[6] *Rex* v. *Beeby*,[7] *Rex* v. *Frampton*.[8])

On the third question their Lordships think it is highly undesirable that an accused person should be tried on counts that he made a seditious speech and also that he effected a public mischief by making the said speech, yet that is what happened in the present case, with the result that the jury found the appellant not guilty of sedition but guilty of effecting a public mischief by making a speech the mischief of which was its allegedly seditious nature.

On the fourth question their Lordships are of opinion that on the indictment as framed there was no evidence to go to the jury.

For these reasons their Lordships will humbly advise Her Majesty that the appeal ought to be allowed and the conviction quashed.

There will be no order as to costs as there are, in their Lordships' view, no such circumstances as to justify a departure from the ordinary rule in criminal cases.

Solicitors: *Garber, Vowles & Co.; Charles Russell & Co.*

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[6] (1910) 4 Cr.App.R. 179.
[7] (1911) 6 Cr.App.R. 138.
[8] (1917) 12 Cr.App.R. 202.

J. C.*
1954
Dec. 13.

UNITED AFRICA COMPANY LIMITED . APPELLANTS;

AND

SAKA OWOADE . . . . . . RESPONDENT.

ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL.

West Africa — Vicarious liability — Master and servant — Fraud — Carriage of goods—Ordinary carrier—Conversion—Liability of master for theft by servant—In course of employment.

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* *Present*: LORD OAKSEY, LORD KEITH OF AVONHOLM and MR. L. M. D. DE SILVA.

J. C.

1954

United Africa Co. Ld. v. Saka Owoade.

Practice—Pleadings—Statement of claim—Need only state facts.

Practice—Security for costs—Form—" Enter into " good and sufficient security—Bond not necessary—Deposit of cash—Appeal to Privy Council. Privy Council—Appeal.

Vicarious Liability. Fraud.

A master is liable for his servant's fraud perpetrated in the course of the master's business, whether the fraud was for the master's benefit or not, if it was committed by the servant in the course of his employment. There is no difference in the liability of a master for wrongs whether for fraud or any other wrong committed by a servant in the course of his employment, and it is a question of fact in each case whether it was committed in the course of the employment.

Where, therefore, the appellant company, general merchants, had expressly committed to servants of the respondent, a transport contractor, at his request, goods for carriage by road, and the servants stole the goods, and the evidence established that that conversion took place in the course of their employment, the respondent was liable to the appellants for the value of the goods.

Lloyd v. *Grace, Smith & Co.* [1912] A.C. 716; 28 T.L.R. 547 applied.

Cheshire v. *Bailey* [1905] 1 K.B. 237; 21 T.L.R. 130 considered.

So far as the statement of claim is concerned, the pleadings need only state facts and not contentions of law.

On an application by the appellant company to the court below for leave to appeal to the Privy Council it was ordered as a condition of granting leave that the appellants " do enter into " good and sufficient security . . . in the sum of £500 . . ." :—

Held, that the deposit of £500 in cash was as good as, if not better than, a bond, and was a sufficient compliance with the order of the court to " enter into " good and sufficient security. On the strict wording of the order only the appellant company itself could enter into security, and in cases where the appellant was not a person of substance a bond would be of much less value than the actual sum.

Judgment of the West African Court of Appeal reversed.

Appeal (No. 30 of 1952) from a judgment of the West African Court of Appeal (May 15, 1951) allowing an appeal by the respondent from a judgment of the Supreme Court of Nigeria (Judicial Division of Lagos) (March 30, 1950) in favour of the appellants for £4,732 13s. 4d. The West African Court of Appeal gave judgment for the respondent. It was also an appeal from an order of the West African Court of Appeal (November 19, 1951) refusing the appellants final leave to appeal to His late Majesty in Council from the judgment of May 15, 1951.

Special leave to appeal to Her Majesty in Council against both the judgment and the order was granted by Her Majesty at a Council held on April 9, 1952.

The appellants were general merchants in Lagos and elsewhere in West Africa. The respondent owned lorries and was a transport contractor. In February, 1948, the respondent came to the appellants' premises and saw certain of their employees and solicited employment to carry goods from Lagos to the appellants' branches up-country. He introduced to the appellants' employees two men whom he said were his driver and clerk, and stated that when the appellants had goods for him to carry they should give them to the driver and clerk. The clerk in question attended at the appellants' premises on two occasions in March and April, 1948, and on each occasion was given certain goods, namely, cigarettes and brandy, the total value of which was £4,777 9s. 4d., for carriage to two branches up-country. The goods were never delivered to the two branches up-country and the lorry driver and clerk were subsequently convicted of stealing them.

The appellants issued their writ on March 2, 1949, claiming £4,777 9s. 4d. the value of the goods. The statement of claim was delivered on April 11, 1949, and the defence on April 22, 1949. The case came on for hearing on February 27, 1950.

The appellants' counsel in opening the case said that the appellants put their case in two alternate ways: first, they said that the respondent was a common carrier who had failed to deliver the goods, and, secondly, they said that he was liable on the basis of respondeat superior. That phrase was used both by counsel and by the trial judge as covering a conversion or detention of the goods by the respondent's servants acting in the course of their employment and for which it was claimed by the appellants that the respondent was liable. The appellants called two witnesses who established the facts already recited. The case was then adjourned to March 14. When the hearing was resumed counsel for the respondent elected to call no evidence and submitted that he had no case to answer since the appellants had not proved that the respondent was a common carrier, and he alleged that no other case was open to the appellants on the pleadings. The trial judge (Reece J.) reserved judgment, and his reserved judgment was given on March 30, 1950. The judge held that the goods had been delivered to the respondent's servants in the course of their employment and stolen by them in such capacity, and gave judgment for the appellants for £4,732 13s. 4d. There was nothing in the judgment to show why that figure was substituted for £4,777 9s. 4d., but it appeared probable that this was due to some oversight. Upon the question of the pleadings, the judge said that the pleadings should contain, and contain only, the material facts relied upon and not contentions of law, and that the statement of claim did contain allegations of the facts material to their alternate case for conversion.

The respondent appealed to the Court of Appeal and the case was heard on May 15, 1951, by Verity P. (C.J. Nigeria), Lewey J.A. and De Comarmond J. The Court of Appeal held that the form of the pleadings was such that the appellants were only entitled to rely upon non-delivery by a common carrier, and that as they had not proved that the respondent was a common carrier their case must fail. The Court of Appeal therefore gave judgment for the respondent.

As the sum involved exceeded £500 the appellants were entitled, under the provisions of the relevant Order in Council, to appeal to His late Majesty in Council subject to fulfilment of certain conditions, one of which was the provision of such security for the respondent's costs as should be fixed by the Court of Appeal. The Court of Appeal on July 2, 1951, fixed the security at £500 and also ordered the appellants to pay £50 into court to cover the costs of the preparation of the record. Pursuant to that order the appellants, within the time stated in the order of the Court of Appeal, paid into court to the credit of the appeal the sum of £550. The relevant portion of the order of the Court of Appeal giving conditional leave to appeal was in the following terms:—

"It is ordered that conditional leave to appeal in the above "matter to His Majesty's Privy Council be granted to the "United Africa Company Limited the plaintiffs/appellants upon "fulfilment within three months from the date hereof of the "following conditions.

"(A) that the plaintiffs/appellants, the United Africa Com-"pany Limited, do deposit in court the sum of £50 for the "preparation of the record of appeal and for the despatch thereof "to His Majesty's Privy Council.

"(B) that the plaintiffs/appellants, the United Africa Com-"pany Limited, do enter into good and sufficient security, to "the satisfaction of the court, in the sum of £500 for the due "prosecution of the appeal and the payment of all such "costs as may become payable to Saka Owoade, the defendant/ "respondent . . ."

The respondent took the point that paragraph (B) of the order could only be fulfilled by the provision of a bond and that payment of the sum of money mentioned, namely £500, into court was not a compliance with the order.

That matter came before the Court of Appeal and the judgment of the court was given on November 19, 1951, by Jibowu J. The judgment was that the payment into court was not a compliance with the order, and the Court of Appeal therefore refused leave of appeal to His late Majesty in Council.

The appellants petitioned for special leave to appeal to Her Majesty in Council against both the substantive judgment of May 15, 1951, and also against the order of November 19, 1951, refusing leave to appeal from the said judgment. On April 9, 1952, the appellants were granted special leave to appeal to Her Majesty in Council against both judgment and order.

1954. Nov. 1, 2, 3. *T. G. Roche* for the appellants. The main appeal is of a technical character and turns on submissions on the pleadings. The appellants said, first, that the respondent was a common carrier and, therefore, responsible, and secondly, they relied on respondeat superior. The respondent said that the appellants' pleadings alleged that he was a common carrier, that they had to prove that, and had not done so, and therefore could not succeed against him unless they pleaded and proved negligence. The provisions as to pleadings in West Africa are practically identical with those in England, except that in England one has to set out in the writ the nature of the claim, and in West Africa the subject-matter of the claim. Counsel for the appellants at the trial accepted the fact that they had not established that the respondent was a common carrier, but said that they need not prove negligence because they had pleaded and proved that the respondent's servants stole the goods, and he was liable for their tort of conversion. The trial judge said that the statement of claim pleaded the essential facts, and he was satisfied that the servants stole the goods, and he found for the appellants. On appeal, the West African Court of Appeal held that on the pleadings the appellants were only entitled to rely on non-delivery by a common carrier, and that, not having proved that the respondent was a common carrier, they failed.

It is a perfectly good pleading in conversion simply to say that the defendant stole goods the property of the plaintiff. The three courses open to a person who employs a carrier who does not deliver the goods are: He may sue (1) in contract, (2) in conversion, (3) in detinue. Those are entirely alternative. The appellants have not pleaded and proved the first. It is submitted that they have pleaded conversion in the clearest possible terms—"we entrusted the goods to your servants and they stole them"—and they stand fairly and squarely on the point of conversion. The only question that appears to arise is whether or not these goods were stolen in the course of the servants' employment. In the present case the holding out is even more direct than in *Lloyd* v. *Grace, Smith & Co.*,[1] and applying that case here, where the evidence given was not challenged, and the respondent had said that the two men were authorized to receive and carry goods, and the goods were given to them for carriage, and they stole them, it is for the respondent, if he wishes to avoid the obvious inference from that, to give some explanation which will rebut that inference. The essential question is whether the appellants pleaded and proved those facts which are necessary for them to succeed on conversion. If one entrusts goods to a carrier and he steals them, those are the two essential facts, and he is guilty of conversion. It cannot make any difference that he delegates to somebody else. Here the respondent expressly held out the driver and clerk as the persons to receive and carry the goods. The appellants have pleaded and proved the essential facts to establish conversion—that the respondent requested the appellants to entrust any goods to his delegates; that they did so; and that the delegates stole them.

In their judgment the Court of Appeal said that had the appellants intended to sue the respondent, in the alternative, as a private carrier, they should have complied with Ord. 22, r. 8, of the Supreme Court (Civil Procedure) Rules, which provides that: "Where the plaintiff seeks relief in respect of several distinct claims or causes of complaint founded upon separate and distinct facts, they shall be stated as far as may be, separately and distinctly." The present, however, is not such a case; both causes of action here are founded on the same facts.

With regard to the appeal on the procedural point, the words "enter into good and sufficient security" follow the words of the Order in Council, and it should be settled by the Board whether payment into court is a sufficient compliance or whether some kind of bond must be given. The money was paid in to the credit of this action. It would be most unfortunate if deposit in court is not a good and sufficient security. The Court of Appeal's order refusing final leave to appeal was wrong.

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[1] [1912] A.C. 716; 28 T.L.R. 547.

Phineas Quass Q.C. and *S. N. Bernstein* for the respondent. The Court of Appeal, strictly speaking, was right on the security point: *Cliffe* v. *Wilkinson.*[2] If, however, the Board thinks that payment of money into court is good and sufficient security, it is not sought to suggest to the contrary.

With regard to the substantive appeal, both courts below took the view on the written pleadings and, it is submitted, the correct view, that the only claim that was put forward against the respondent in the original statement of claim was against him as a common carrier. The Record discloses no suggestion that the case was being laid in conversion or detinue at all. The trial judge took the facts and then applied his view of the law to them. Why was there no application to amend the pleadings so as to allege conversion if it was sought to rely on that? It is no part of the duty of the defendant's counsel to see that the statement of claim is in order. They could have asked for leave to amend in the Court of Appeal. The facts on which it is sought to make the respondent liable are: It has been established (1) that he is a private carrier; (2) that he introduced himself to the appellants as a private carrier, and his clerk and driver as persons to whom goods were to be entrusted for carriage; (3) that later, on two separate occasions, the clerk and driver called on the appellants and were given goods to be transported; (4) that the goods were stolen by them. Those are the only facts established. There is no evidence that the goods were ever taken away in the respondent's lorry. On the authorities in England—and the law to be applied is the common law of England—even if they were in the respondent's lorry that could not make him liable. There is nothing at all to connect the respondent with the appellants' goods. There is no evidence that the goods ever reached the respondent; or that they were ever entrusted to him; or that they were delivered to the thieves on the respondent's behalf; and no evidence that when they collected the goods they even said that they came from the respondent. In the statement of claim it is not even alleged that the goods were taken by the clerk on behalf of the respondent, or were entrusted to the respondent. But it should be added that that is suggested in the writ.

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[2] (1830) 4 Sim. 122.

Whatever the form of pleading here, on the matter before the court it is submitted that there was no liability on the respondent. In the absence of negligence by the master there is no liability on him if his servants steal goods. As a matter of law, in the absence of negligence by the master theft by a servant cannot arise in the course of the employment. The master can be negligent in the choice of his servant, and if that is connected with the theft he will be liable—that is the only case in which it can arise. If the appellants had amended their statement of claim the weakness of their case would have appeared, because on the facts they could have made no case against the respondent. There appears to be no case where, in the absence of negligence, a bailee has been held responsible for theft by his servant—not a single case. There is direct authority to the contrary—cases where it has been sought to make the bailee liable for the theft by the servant, and they have failed. *Cheshire* v. *Bailey* [3] is the leading case on this branch of the law. Negligence must be alleged and established. In *Joseph Rand Ld.* v. *Craig* [4] it was said that the dustmen had gone out of the way for their own purposes and that dumping the rubbish on the plaintiff's land did not arise in the course of their employment, and the plaintiff's action failed. In *Malcolm Brunker & Co. Ld.* v. *Waterhouse & Sons* [5] *Cheshire's* case [6] was cited, apparently with approval. *Lloyd* v. *Grace, Smith & Co.* [7] was relied on for the appellants here, and the trial judge decided this case solely on it. It is not relied on for the respondent. In *Lloyd's* case [7] *Cheshire's* case [8] was relied on in argument, but Lord Shaw drew a distinction between the facts of the two cases and quite clearly cited *Cheshire's* case [8] with approval, and *Cheshire's* case is exactly the respondent's case here.

Once it appears that the act of the servant is in the course of the employment, then the conduct of the master is immaterial. If the act is not in the course of the employment, then negligence of the master may come into the picture. It is difficult as a matter of logic to see any difference between the *Cheshire* v.

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[3] [1905] 1 K.B. 237.
[4] [1919] 1 Ch. 1.
[5] (1908) 24 T.L.R. 854, 856
[6] [1905] 1 K.B. 237.
[7] [1912] A.C. 716.
[8] [1905] 1 K.B. 237.

Bailey[8] and the *Lloyd* v. *Grace, Smith & Co.*[9] lines of cases, and there is authority for the view that *Lloyd's* case[9] indicates that *Cheshire's* case[10] ought to have been differently decided. [Reference was also made to *Williams* v. *The Curzon Syndicate (Ld.)*[11] and *Mintz* v. *Silverton.*[12]] *Cheshire* v. *Bailey*[13] was decided 49 years ago and has certainly never been overruled; the last case in which it has been considered was *Central Motors (Glasgow) Ld.* v. *Cessnock Garage and Motor Co.*,[14] in which Lord Sands thought that he could distinguish the *Cheshire* case[15] from *Lloyd's* case[16]—it was an attempt to reconcile those two cases. It is submitted that *Cheshire's* case[17] is still good law, has never been disapproved, and has been referred to with approval in subsequent cases. It decides that the theft by a servant of a bailee does not arise in the course of the servant's employment. It more than carries the respondent home. In *Joseph Rand Ld.* v. *Craig*[18] the headnote states "*Lloyd* v. *Grace, Smith & Co.*[19] "distinguished"; but in the Court of Appeal that case was not mentioned, so the headnote is perhaps a little misleading.

The only fact against the respondent is the introduction of the thieves coupled with the fact that months later they called on the appellants and were given some goods for carriage. Whether a person is a common carrier is a question of fact. Having reached the conclusion, which is the right one, that the pleadings based the claim on common carrier, the trial judge ought to have given judgment for the respondent, but he did not do so: *Thorp* v. *Holdsworth.*[20]

S. N. Bernstein following. All the evidence went to the material issue that the respondent was a common carrier. A pleading is to be strictly construed: *Gautret* v. *Egerton*[21]; *West Rand Central Gold Mining Co.* v. *Rex.*[22] For the law relating to the liability of a bailee, see Salmond on Torts, 11th ed., pp. 113, 115, and Halsbury's Laws of England, 3rd ed., vol. 1, p. 222; vol. 2, pp. 123, 126 and 224. [Reference was also made to The Law of Delict, by Prof. McKerron, 3rd ed., p. 130.] The only issue before the court on the pleadings was whether the respondent was a common carrier, and that was not established. Alternatively, it is submitted that the case is governed by and covered by the authority of *Cheshire* v. *Bailey*.[23]

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[8] [1905] 1 K.B. 237.

[9] [1912] A.C. 716.

[10] [1905] 1 K.B. 237.

[11] (1919) 35 T.L.R. 475.

[12] (1920) 36 T.L.R. 399.

[13] [1905] 1 K.B. 237.

[14] 1925 S.C. 796, 803.

[15] [1905] 1 K.B. 237.

[16] [1912] A.C. 716.

[17] [1905] 1 K.B. 237.

[18] [1919] 1 Ch. 1.

[19] [1912] A.C. 716.

[20] (1876) 3 Ch.D. 637, 639.

[21] (1867) L.R. 2 C.P. 371.

[22] [1905] 2 K.B. 391, 399; 21 T.L.R. 562.

T. G. Roche in reply. The necessary facts to establish a case of conversion were pleaded. The proposition for the respondent—that theft by a servant can never arise in the course of his employment unless negligence in the master is proved—suffered its death blow in *Lloyd* v. *Grace, Smith & Co.*[24]; that is intended to be a clear statement of the law—that there is no distinction between fraud and any other wrong. *Cheshire's* case [25] is said to be authority for the proposition that directly a servant steals he must automatically be outside the scope of his employment. That judgment, however, must be approached with some doubt as to the assistance to be derived from it at the present time. It is possible to take the view that it was a decision purely on the scope of authority. It was a decision on its own facts, which were very different from the facts here, but if it is to be treated as a decision that theft cannot be within the scope of authority it is wrong. [Reference was also made to the *Central Motors* case [26] and *Aitchison* v. *Page Motors Ld.*[27]] A master is responsible for any wrong done by his servant acting in the course of his employment, and there is no rule of law which excludes theft. The sole question must be, what is the servant entrusted to do and what has he done? In this case he was given the appellants' goods as his master's delegate to receive, carry and deliver them, and in the course of doing those things he stole the goods.

Lastly, on the question of evidence, the onus of proof always rests on the bailee: *per* Scrutton L.J. in *Coldman* v. *Hill*.[28] In the present case the bailee did not choose to give evidence, and in those circumstances it would be quite wrong to assume that it was not his lorry.

Dec. 13. The judgment of their Lordships was delivered by Lord Oaksey, who stated the facts as set out above and continued: As the substantive appeal turns almost entirely upon the form of the pleadings it is necessary to set them out in full. They are as follows:—

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[23] [1905] 1 K.B. 237.

[24] [1912] A.C. 716, 734.

[25] [1905] 1 K.B. 237.

[26] 1925 S.C. 796, 802.

[27] (1935) 154 L.T. 128.

[28] [1919] 1 K.B. 443, 454, 458; 35 T.L.R. 146.

"No. 1.

"Suit No. 51/49.

"Civil Summons.

"Between

"THE UNITED AFRICA CO. LD. . . . . Plaintiffs

"and

"SAKA OWOADE . . . . Defendant.

"To Saka Owoade of Alade Street, Isale Ijebu, Ibadan, or "c/o John Holt & Co. Ld., Ibadan (Produce Department).

"You are hereby commanded in His Majesty's name to "attend this court at Tinubu Square, Lagos, on Monday the "28th day of March, 1949, at 9 o'clock in the forenoon to answer "a suit by The United Africa Co. Ld., of c/o Messrs. Irving "& Bonnar, Barclays Bank Chambers, Lagos, against you.

"The plaintiffs' claim against the defendant is in the sum of "£4,777 9s. 4d., whereof £4,732 13s. 4d. is value of 40 cases "Guinea Gold Cigarettes and £44 16s. is cost of four cases of "Jules Charrent brandy delivered and accepted by the defen-"dant's clerk and lorry driver on behalf of the defendant on "or about March 15, 1948, and April 13, 1948, as common "carriers for transporting to the plaintiffs' station at Ilorin which "he has failed to deliver.

"Issued at Lagos the 2nd day of March, 1949

	£	s.	d.
"Summons	25	0	0
"Service		5	6
	"£25	5	6

"(Sgd.) FRANCIS H. BAKER,
Senior Puisne Judge.

"TAKE NOTICE: That if you fail to attend at the hearing "of the suit or at any continuation or adjournment thereof, the "court may allow the plaintiff to proceed to judgment and "execution."

J. C.
1954

UNITED AFRICA CO. LD. v. SAKA OWOADE.

" No. 2

" STATEMENT OF CLAIM

" STATEMENT OF CLAIM

" 1. The plaintiffs are a limited liability company carrying on " the business inter alia of wholesale suppliers of goods in Lagos " and elsewhere. The defendant is a produce assistant to " Messrs. John Holt & Co. Ld. in Ibadan, and also owns lorries " and carries on a road transport business as a common carrier.

" 2. In February, 1948, the defendant introduced his clerk " and a lorry driver to the clerk to the plaintiffs who deals with " despatch of goods up-country and also introduced the said " clerk and lorry driver to the plaintiffs' storekeeper. The defen- " dant requested at the same time that the plaintiffs should " entrust him with freight of their goods to stations up-country.

" 3. In March, 1948, the plaintiffs entrusted goods to the " value of £4,777 9s. 4d. to the clerk to the defendant for " carriage and delivery to places up-country.

" 4. The said goods were never delivered to their destinations " and the said clerk and lorry driver to the defendant were later " convicted of the theft of the said goods.

" 5. The defendant is liable as a common carrier to make " good to the plaintiffs the value of the said goods but has " failed to do so.

" Whereof the plaintiffs claim as per writ of summons.

" Dated at Lagos this 11th day of April, 1949.

" (Sgd.) IRVING & BONNAR,
" Plaintiffs' Solicitors."

" No. 3.

" DEFENCE

" STATEMENT OF DEFENCE

" 1. The defendant denies paragraphs 2, 3, 4 and 5 of the " plaintiffs' statement of claim and puts the said plaintiffs to " their very strict proof.

" 2. The defendant admits paragraph 1 of the plaintiffs' " statement of claim save and except the averment that he is " a common carrier which he denies and puts the said plaintiffs " to their strict proof.

"3. The defendant says that the person alleged to be his "clerk in paragraph 3 was not and has never been his clerk is "one who touts for passengers and loads to be carried to certain "places and is in no way an agent of the defendant.

"4. The defendant became aware of paragraph 4 after the "prosecution of his driver and the said tout Simeon Dejo.

"5. The defendant avers that he is not a common carrier.

"6. The defendant says that his driver did not have the said "defendant's consent before the said goods of the plaintiffs were "entrusted to him, nor was it done with his knowledge.

"Dated at Lagos this 22nd day of April, 1949.

"(Sgd.) JOHN TAYLOR.
"Defendant's Solicitor."

The Court of Appeal in their judgment held that the writ did not comply with the provisions of Ord. 2, r. 2, of the Supreme Court (Civil Procedure) Rules, which laid down that a writ of summons should state briefly and clearly the subject-matter of the claim and the relief sought for. In their Lordships' opinion the writ did do both these things since it was clearly shown that the appellants' complaint was that they had entrusted goods to the value of £4,777 9s. 4d. to the respondent's servants and that they had never been delivered, and it also showed the relief claimed, namely, judgment for the value of the goods. However, even if this were not so, any defect in this respect was cured by the statement of claim.

So far as the statement of claim is concerned, in their Lordships' opinion the trial judge was correct in stating that the pleadings need only state facts and not contentions of law.

Paragraphs 2 and 3 contain all the allegations of fact necessary to establish that the goods were delivered to the respondent's servants acting in the course of their employment for delivery to the appellants' premises up-country. In paragraph 4 it is stated that the goods were never delivered to their destination and the clerk and lorry driver of the respondent were later convicted of the theft of the said goods. In the judgment of the Court of Appeal it was suggested that this pleading did not comply with Ord. 22, r. 8, of the Civil Procedure Rules, the material part of which reads: "Where the plaintiff seeks relief "in respect of several distinct claims or causes of complaint "founded upon separate and distinct facts, they shall be stated "as far as may be, separately and distinctly."

The alternate cases submitted on behalf of the appellants at the trial were not founded on separate distinct facts. The facts were the same, namely, that the goods had been delivered to the respondent's servants acting in the course of their employment and had not been delivered but had been stolen by the said servants. If the respondent were a common carrier then he would be liable for the non-delivery unless he could establish one of the very few excuses available to a common carrier, such as act of God. If he were not a common carrier he could, of course, escape liability by showing that the goods were lost without any fault on his part. The distinction between the case as against a common carrier and as against an ordinary carrier lay not so much in the facts to be established by the appellants but the defences open to the respondent. In any case, paragraph 4 of the statement of claim did set out separately the alleged theft of the goods, which was not necessary to be established in the case relating to a common carrier but was a material factor in a case of conversion or detinue.

Upon these pleading points their Lordships find themselves in agreement with the view of the judge at the trial.

There was no question of surprise, since the appellants' counsel stated his contention in opening the case on February 27, 1950, and it was not until March 14, 1950, that the respondent's counsel made any objection. In such circumstances, if the judge thought that the pleadings were not sufficiently clear or did not adequately raise the case which the appellants desired to make he should have ordered them to be amended. But the judge was, in their Lordships' view, entitled to hold, as he did hold after full consideration of the respondent's submission, that the appellants' contention was open upon the pleadings as they stood, and in this in their Lordships' judgment the judge was right. The facts stated in paragraphs 2, 3 and 4 of the statement of claim are sufficient to raise the question of the respondent's liability apart from any liability as a common carrier.

On October 28, 1954, the respondent amended his printed case and has argued before their Lordships' Board that a principal or master cannot be liable for his agent's or servant's fraud unless the principal or master has been himself negligent. This argument was based principally upon the case of *Cheshire* v. *Bailey*.[1]

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[1] [1905] 1 K.B. 237; 21 T.L.R. 130.

In their Lordships' opinion, *Lloyd* v. *Grace, Smith & Co.*[2] establishes the principle that a master is liable for his servant's fraud perpetrated in the course of the master's business whether the fraud was committed for the master's benefit or not. The only question is whether the fraud was committed in the course of the servant's employment. In that case it was clearly in the course of the servant's employment since it was the fraud of a solicitor's clerk in the solicitor's office on the business of the solicitor's client. In *Cheshire* v. *Bailey*[3] it was held that the criminal act of the servant had not occurred in the course of his employment. The contract was not a contract of carriage of goods but the hire of a brougham for the personal use of a jeweller's traveller in the course of his business. The servant drove the brougham away when the traveller was absent and by arrangement with two thieves participated in the theft of jewellery left by the traveller in the brougham. Their Lordships do not find it necessary to decide whether that case is distinguishable on its facts from *Lloyd* v. *Grace, Smith & Co.*[4] or has been overruled by the decision in *Lloyd* v. *Grace, Smith & Co.*[4]

In the present case the fair inference from the facts proved is that the goods were committed expressly to the respondent's servants and that they converted the goods whilst they were on the journey which the respondent had undertaken to carry out, and the conversion therefore was in their Lordships' view in the course of the employment of the respondent's servants. There is in their Lordships' opinion no difference in the liability of a master for wrongs whether for fraud or any other wrong committed by a servant in the course of his employment. It is a question of fact in each case whether the wrong was committed in the course of the servant's employment, and in the present case their Lordships are of opinion that upon the uncontradicted evidence the conversion of the appellants' goods took place in the course of the employment of the respondent's servants.

As Her Majesty in Council has granted special leave in this case the question as to the adequacy of security only directly affects the question of costs, but it may have some general importance. In their Lordships' view it is too narrow a construction of the words of the order to treat the actual deposit of the sum in which the appellants were ordered to find security as insufficient on the ground that the appellants did not " enter into

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[2] [1912] A.C. 716; 28 T.L.R. 547.
[3] [1905] 1 K.B. 237.
[4] [1912] A.C. 716.

"good and sufficient security." The sum of money was as good as, if not better than, a bond, and on the strict wording of the order only the appellant company itself could enter into security, and in cases where the appellant was not a person of substance the bond would be of much less value than the actual sum.

For these reasons their Lordships will humbly advise Her Majesty that the appeals should be allowed and judgment entered for the appellant company for £4,777 9s. 4d. The respondent must pay the costs before their Lordships' Board and in the courts below.

Solicitors: *Linklaters & Paines; A. L. Bryden & Williams.*

J. C.*
1954
Nov. 3.

MURUGIAH, P. . . . . Appellant;

AND

JAINUDEEN, C. L. . . . . . . Respondent.

ON APPEAL FROM THE SUPREME COURT OF CEYLON.

Ceylon—Collation—Hotchpot—Advancement of land—Option of heir to bring in property or its value—Title of purchaser of land advanced —Matrimonial Rights and Inheritance Ordinance (Laws of Ceylon, 1938, *c.* 47), *s.* 35.

Statute—Construction—Presumption against implied change of law. Hotchpot.

A parcel of land situated in Ceylon which had been given by a father to his son was, upon the father dying intestate, held by a judicial decision of February, 1941, to be liable to collation on the ground that it was given to the son "on the occasion of his "marriage" within the meaning of section 35 of the Matrimonial Rights and Inheritance Ordinance. The land, having been mortgaged by the son after the date of the judgment, was later sold as a result of proceedings commenced by the mortgagee. The purchaser claimed a declaration that he was entitled to the land as against the administrator of the father's estate, who relied upon the judgment of February, 1941, and contended that by virtue thereof the son had lost all rights over the land:—

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* *Present*: Lord Morton of Henryton, Lord Cohen, Lord Keith of Avonholm, Mr. T. Rinfret (Chief Justice of Canada) and Mr. L. M. D. de Silva.

[Reported by Miss Elaine Jones, Barrister-at-Law.]

Held, that the doctrine of hotchpot or collation according to the common law of Ceylon, which conferred upon a donee of property, electing to claim as heir his share in the estate of the donor, an option to discharge his liability to collate either by bringing the property or the value of the property into account, was not varied in that respect by section 35 of the Ordinance; it, therefore, imposed no fetter on the donee's power to sell or mortgage the land and the purchaser acquired a good title.

APPEAL (No. 37 of 1953) from a judgment of the Supreme Court of Ceylon (Gunasekara and Swann JJ.) (September 18, 1952) reversing a decision of the District Court of Matale (Wijesekera D.J.) (January 25, 1951) and declaring that the respondent was entitled to 10 acres of land, part of a parcel of 27 acres, 1 rood and 22 perches of land, known as Kirigalpottewatta, situate at Udugama in the Central Province of Ceylon.

In 1927, one Ponniah was the owner of Kirigalpottewatta, but on November 1, 1927, he executed a deed of gift by which he conveyed the 10 acres now in question to his son Sellasamy, reserving a life interest to himself. In the deed of gift the 10 acres were expressed to be of the value of Rupees 6,000. This deed was never registered under the Registration of Documents Ordinance. Ponniah died on May 26, 1936, and in September, 1936, his widow commenced proceedings (Case No. 5437) in the District Court of Kandy, asking for letters of administration to be granted to her of the deceased Ponniah's estate and asking also that certain lands donated by Ponniah in his lifetime (including the land now in question) should be brought into hotchpot and treated as part of his estate. Sellasamy was the first respondent to that suit and five other persons were made respondents thereto. On December 7, 1936, Sellasamy swore an affidavit opposing grant of letters of administration to the widow in the course of which he (*a*) denied that the second, third and fourth respondents to the suit were the legitimate issue of Ponniah and (*b*) alleged that he was not bound to bring into hotchpot the 10 acres of land since they were not given to him on the occasion of his marriage or for his advancement or establishment in life.

The relevance of that allegation was that by section 39 of Ordinance No. 15 of 1876, reproduced by section 35 of the Matrimonial Rights and Inheritance Ordinance, it is enacted that "Children or grandchildren by representation becoming with "their brothers and sisters heirs to the deceased parents are "bound to bring into hotchpot or collation all that they have "received from their deceased parents above the others either "on the occasion of their marriage or to advance or establish "them in life, unless it can be proved that the deceased parent, "either expressly or impliedly, released any property so given "from collation."

On June 28, 1937, the District Judge granted letters of administration to the widow, and by consent the donated properties were left, for the time being, in the possession of the donees.

The questions raised by Sellasamy's affidavit of December 7, 1936, were dealt with by the District Judge on February 3, 1941. He found that the second, third and fourth respondents were legitimate and then proceeded:—"The only other question to "be decided is whether the first respondent who was given a "deed of gift No. 7881 of 1927 (1 R 3) by his father Ponniah "should bring the property gifted into collation if he wishes to "inherit as an heir. The point to determine is whether, as is "stated by respondents two to six, such gift was made on the "occasion of his marriage."

After referring to section 39 of Ordinance No. 15 of 1876 and considering the evidence, which was directed to the point that the only marriage contemplated by Sellasamy at the date of the deed of gift had never taken place, he expressed the opinion that the fact that the marriage did not take place made no difference, as the section applied to a gift made on the occasion of a marriage performed or contemplated. He concluded as follows:—"I "therefore hold that:—1. All the respondents are lawful heirs. "2. The property gifted to the first respondent was on the occasion "of his marriage and that its value was Rupees 6,000 and that it "must be brought into collation. I would also order that the "first respondent do pay to the other respondents the costs of "this inquiry." No formal order appears to have been drawn up to give effect to this decision, and no transfer by Sellasamy to the administrator was ever executed. Sellasamy appealed first to the Supreme Court of Ceylon and then to the Judicial Committee on the question whether the property was liable to collation and in both courts the decision of the District Judge was affirmed.

On February 26, 1942, Sellasamy mortgaged the property for Rupees 1,500, but this mortgage was paid off. It was entered on the register of incumbrances pursuant to the Registration of Documents Ordinance. On February 24, 1944, Sellasamy mortgaged the property for Rupees 4,000 advanced by one Appuhamy. That mortgage was also registered.

On August 26, 1948, Appuhamy commenced proceedings to enforce his mortgage, and recovered judgment on February 25, 1949. The property was in due course sold by the deputy fiscal pursuant to an order made on August 9, 1949. It was bought by the respondent for Rupees 400 and was conveyed to him by the deputy fiscal on February 21, 1950.

On May 19, 1950, the appellant, who had become the administrator of Ponniah's estate, in succession to the widow, procured the registration of the decree of February 3, 1941, on the footing, it seems, that the judgment was an instrument affecting land within the meaning of section 8 of the Registration of Documents Ordinance.

On August 9, 1950, the respondent commenced the present proceedings against the appellant. The respondent alleged that the appellant had wrongfully and forcibly entered into possession of the land in dispute some three months previously, and claimed a declaration that he (the respondent) was entitled to the land and to consequential relief. The appellant relied on the order made in Case No. 5437 on February 3, 1941, and contended that by virtue thereof Sellasamy lost all rights to the land in dispute. The appellant also relied on the registration of that order as giving him priority over the respondent under section 7 of the Registration of Documents Ordinance. On December 21, 1950, the respondent moved to amend his plaint so as to enable him to rely on section 3 of the Prescription Ordinance, No. 22 of 1871. It was not clear whether that application was granted, but for reasons which will appear hereafter this point was of no importance.

The pleadings being closed, issues were framed as follows:—(1) Has the title of Sellasamy derived on P2 (the mortgage of February 24, 1944) passed to the [respondent] on P3 (the conveyance by the deputy fiscal on February 21, 1950)? (2) Is the order made on February 3, 1941—D2 in Testamentary proceedings 5437 of D.C. Kandy—res judicata between the parties? (3) If so, is [the appellant] as administrator of the said estate in lawful possession of the said premises?

On January 25, 1951, the District Judge gave judgment dismissing the action. He held that the effect of the order of February 3, 1941, was that the subject-matter in dispute lost its identity and got submerged in the estate, Sellasamy and the other heirs becoming entitled to an undivided share of the whole estate. Accordingly he answered the issues as follows: "1. No. "2. Yes. 3. Yes." From that order the respondent appealed, and on September 18, 1952, the Supreme Court allowed the appeal, declared the respondent entitled to the property in dispute, and made an order for the ejection of the appellant therefrom.

1954. Oct. 11. *R. O. Wilberforce Q.C.* and *Gilbert Dold* for the appellant. Steyn's Law of Wills in South Africa (1935 ed., p. 103) correctly summarizes the Roman-Dutch law applicable in Ceylon before the Matrimonial Rights and Inheritance Ordinance of 1876. It is submitted that there is a significant difference between the above passage and section 35 of the Ordinance as now framed (see Laws of Ceylon, 1938 Rev., c. 47, s. 35). First, the Ordinance makes no reference to the contingency that a child or descendant might not wish to claim a share in the inheritance, and secondly, there is no reference to the value of the property or any option to bring in the value of the property. With reference to the words " above all others " used in section 35 the obligation to collate arises only where there is inequality; its sole purpose is to bring about equality and the words refer only to excess. If the Ordinance were intended to preserve the options the use merely of the words " above all others " was a strange way of doing so. The word " hotchpot " was used merely in an attempt to make the word " collation " understandable to the administrators of what had become an English colony.

In any event, the judgment of February, 1941, is relied upon as deciding that there was a gift to Sellasamy and that that gift formed part of the estate. The matter of the title to the plot of land is, therefore, res judicata, for after the judgment Sellasamy had no option either to renounce heirship or to put the value of the land into collation. The law as to res judicata is well established: (i) it extends to every point in issue between the parties on which judgment was passed; (ii) a party is barred from raising in subsequent proceedings any matter which could have been raised in the first action: *Henderson* v. *Henderson* [1]; (iii) it applies between parties and their privies, and for this purpose a mortgagee and persons claiming under him are privies. The Civil Procedure Code, section 207, establishes the principle of res judicata as part of the law of Ceylon, but the principles of English law as to res judicata also apply in Ceylon: *Samichi* v. *Pieris.* [2] The test is whether the judge declares the rights of the parties, and it matters not that the declaration is not made in the final stage of the action: *Peareth* v. *Marriot.*[3] The case of *Velupillai* v. *Ruthupillai*[4] is authority for the proposition that a mortgagee is a privy and also for the proposition that there need not be the same cause of action as long as there is identity of issues.

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[1] (1843) 3 Hare 100, 115.

[2] (1913) 16 C.N.L.R. 257.

As to registration, it is submitted that both the deed of gift and the judgment originated in Ponniah; the judgment was for valuable consideration, for the other heirs provided consideration in so far as they allowed Sellasamy to share in the estate and it related to an interest in land. The requirements for an effective registration were thus fulfilled. On the other hand, there was no valid registration of the mortgage since such registration as there was was in the wrong folio without cross-reference.

Dingle Foot Q.C. and *Sirimevan Amerasinghe* for the respondent. It is not in dispute that the law as to hotchpot or collation before the enactment of 1876 gave the donee an option to bring the property or its value into the estate of the deceased if he elected to participate in the distribution. It is submitted that the clearest terms would be required before it could be held that the legislature had taken away that option. It was argued for the appellant that the Ordinance of 1876 has removed both options. To make good that argument it is necessary to show that hotchpot or collation means something quite different from what was meant before 1876. This cannot be done merely by inference: see Maxwell on Interpretation of Statutes (10th ed., p. 81), where it is said that there is a strong presumption against implicit changes in the law. The use of the words " collation " and " hotchpot " in the alternative is also relied upon, for hotchpot involves only a liability to account. The words " above the " others " are also prayed in aid as being consistent with a duty to account.

As to res judicata, all that was decided in the previous action was that the gift to Sellasamy was a gift made on marriage in spite of the fact that the marriage went off. [Reference was made to *Sellasamy* v. *Kaliamma.*[5]] His successors cannot be prejudiced for failing to raise the question of the option, for that would not have amounted to a defence to the action. The judgment merely ordered the property to be brought into hotchpot or collation.

R. O. Wilberforce Q.C. replied.

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[3] (1882) 22 Ch.D. 182.

[4] (1923) 25 C.N.L.R. 261.

[5] [1945] A.C. 29; (1944) 61 T.L.R. 99; 46 C.N.L.R. 76.

November 3. The judgment of their Lordships was delivered by LORD MORTON OF HENRYTON, who stated the facts set out above and continued: In passing, their Lordships would observe that in his answer to Appuhamy's claim Sellasamy alleged that the property now in dispute was then included in the estate of Ponniah in Case No. 5437. It was at one time suggested that this was an admission on which the appellant could rely as against the respondent. Having regard to the fact that it was merely a statement made by Sellasamy in proceedings against him by his mortgagee, their Lordships are unable to regard it as in any way binding on the respondent, who derives his title from a sale by the court at the instance of that mortgagee.

As the appellant's claim to the property rests entirely upon the order of February 3, 1941, it is convenient first to consider what was the law applicable at the date when that order was made. It was agreed before their Lordships that the following passage from Steyn's Law of Wills in South Africa (1935 edition, p. 103) was a correct statement of the law applicable in Ceylon before the passing of Ordinance No. 15 of 1876:—" Collation is " the duty incumbent on all descendants who as heirs wish to " share in the succession to an ancestor, either by will or ab " intestate, of accounting to the estate of the ancestor for certain " kinds of gifts and debts received from or owing to him by them " during his lifetime. Thus, if a child, grandchild or more remote " descendant wishes to inherit from a parent, grandparent or " remote ascendant from whom he has during his lifetime " received any property or money as his portion of his inheritance, " or as a marriage gift or otherwise for his advancement in trade " or business or such like, he will, before the division of the " estate, have to bring into or collate with the estate of such " parent etc. either what he may have so received or enjoyed, " or the true value of the same at his option, so that the whole " estate, thus augmented, may be divided in terms of the will of " the testator or according to the law of succession ab intestate."

Thus, if a father gave property to his son on the occasion of the son's marriage, and died intestate, the son had the option of renouncing all claim to share in his father's estate or of bringing the property into collation. If he chose the latter alternative, he had a further option of bringing in either the property itself or the value thereof.

Mr. Wilberforce, for the appellant, submitted that the effect of section 39 of Ordinance No. 15 of 1876 was to take away both of these options and to impose on the donee a positive obligation to bring into the estate, so as to form part thereof, the property the subject of the gift; that there was no option to surrender the value of the property instead of the property itself; and that the order of February 3, 1941, was, in effect, a declaration of title in favour of the administrator of Ponniah's estate. He relied in particular (*a*) upon the fact that the section does not contain any qualifying words such as "if they wish to share in the estate" and (*b*) upon the absence of any reference in the section to the alternative of bringing into hotchpot the value of the property instead of the property itself.

If Mr. Wilberforce's argument is correct, the section made a very striking change in the law, for which he could suggest no reason. Their Lordships do not doubt that if and so far as any provision of the section is inconsistent with the provisions of the common law, the section must prevail. It was for this reason that the Supreme Court in *Vaitianathen* v. *Meenatchi*[1] held that, after the passing of the section, collation took place only when a parent gave property to his children either on the occasion of their marriage or to advance or establish them in life. In their Lordships' view, however, there is nothing in the section inconsistent with the preservation of the two options already mentioned. The first option is preserved by the words "becoming . . . heirs to the deceased parents," which do not rule out the alternative that the donee may elect not to claim his share as an heir. The second option is preserved by the use of the words "bring into hotchpot or collation." The Ordinance under consideration contains no definition of "hotchpot or "collation" nor does it contain any provision from which their Lordships can attribute any particular meaning thereto. The proper course in these circumstances is to attribute to the words the meaning which they bore under the law applicable immediately before the section was enacted. That meaning undoubtedly conferred upon the donee the second of the two options already mentioned.

Mr. Dingle Foot, for the respondent, referred their Lordships to the following passage in Maxwell's Interpretation of Statutes (10th ed., p. 81): "*Presumption against Implicit Alteration of* "*Law*: One of these presumptions is that the legislature does "not intend to make any substantial alteration in the law beyond "what it explicitly declares, either in express terms or by clear

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[1] (1914) 17 C.N.L.R. 26.

"implication, or, in other words, beyond the immediate scope "and object of the statute. In all general matters outside those "limits the law remains undisturbed. It is in the last degree "improbable that the legislature would overthrow fundamental "principles, infringe rights, or depart from the general system "of law, without expressing its intention with irresistible "clearness." Their Lordships agree that the law is correctly stated in the passage cited. They would only add that they agree with the opinion, expressed by Gunasekara J. in the Supreme Court, that the language of the section "confirms rather than "negatives the view that the legislature did not intend to take "away the heir's option to discharge a liability to collation by "bringing the value of the property into account."

Turning to the question of the effect of the order of February 3, 1941, it is important to observe the District Judge's statement of the question he was deciding. Their Lordships will therefore repeat the citation: "The only other question to be "decided is whether the first respondent who was given a deed "of gift No. 7881 of 1927 (1 R 3) by his father Ponniah should "bring the property gifted into collation if he wishes to inherit "as an heir. The point to determine is whether, as is stated by "respondents two to six, such gift was made on the occasion of "his marriage." It is no doubt true that the form of his final conclusion indicates that the judge was assuming that Sellasamy would claim his share in the inheritance, but having regard to the way in which the judge had stated the question he had to determine, their Lordships are unable to construe his order as depriving Sellasamy either of his right to retain his gift and renounce his share in the inheritance or, if he desired to participate, of his option to bring in the value of the gift instead of the property given. Sellasamy thus retained the legal estate in the property, and there was no fetter upon his power to sell or mortgage it. As their Lordships have already stated, he proceeded to mortgage the property and it was sold to the respondent by the deputy fiscal in proceedings commenced by the mortgagee. Thereafter Sellasamy could only claim to participate in the inheritance if he brought in the value of the property given, since he was no longer in a position to bring in the property itself, but this fact in no way affects the respondent's title to the property.

Having regard to the view of the order which their Lordships have just expressed, they cannot regard it as being an instrument affecting land, within section 8 of the Registration of Documents Ordinance. Thus the registration of the order in 1950 was ineffective to defeat the title of the respondent, even if it be assumed that the registration of the two mortgages was also of no effect, as was alleged on behalf of the respondent.

It was suggested in argument that the registration of the order was ineffective to defeat the title of the respondent for other reasons also, but it is unnecessary to state these reasons or to arrive at a conclusion upon them. As the respondent succeeds on the strength of the conveyance to him by the deputy fiscal, their Lordships need not consider whether he ought to be allowed to rely on the Prescription Ordinance No. 22 of 1871.

Their Lordships will humbly advise Her Majesty to dismiss the appeal. The appellant must pay the respondent's costs.

Solicitors: *Stephenson, Harwood & Tatham; Burchells.*

J. C.*
1954
Dec. 14.

GEORGE HANOMAN . . . . APPELLANT;

AND

ARCHIBALD ROSE . . . . RESPONDENT.

ON APPEAL FROM THE WEST INDIAN COURT OF APPEAL.

West Indies (British Guiana) — Practice — Parties — Joinder — Claim against occupier to praedial servitude — Counterclaim — Owner of servient tenement not a party—Substantial issue between parties—Action not fundamentally bad—Joinder of owner—Powers of court —British Guiana Rules of Court, 1900, *Ord. XIV, rr.* 13, 14, 15—*West Indian Court of Appeal Rules,* 1945, *rr.* 16 (1), 5 (1)—*R.S.C., Ord.* 16, *rr.* 11, 12, 13.

Practice—Parties.

The respondent, the owner of land adjacent to land of which the appellant was alleged to be the beneficial owner and occupier in possession, claimed under his titles to be entitled to graze his cattle over the whole of the appellant's land, and he claimed, inter alia, an injunction restraining the appellant from impounding any of his cattle while so grazing. The appellant counterclaimed for, inter alia, a declaration that the respondent's titles did not confer on him the servitude claimed and for damages for trespass. At the time when the action was begun the appellant, who had paid the full purchase price of the land held by him, had not in fact obtained from his vendors a transport (formal conveyance) of the land, and that was known to the respondent before he started his action. The trial judge dismissed the claim and gave judgment for the appellant on the counterclaim. On appeal, the West Indian Court of Appeal, saying that what the respondent was claiming was a real or praedial servitude, held, without going into the merits, that the action should have been directed against the owner of the servient tenement —the vendors—and that the proper parties were not before the court. They dismissed the appeal, adjudged the action to be dismissed, and set aside the judgment on the counterclaim:—

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* *Present*: Lord Oaksey, Lord Keith of Avonholm and Mr. L. M. D. de Silva.

Held, that there was a real and substantial issue raised by the action which vitally and directly affected the rights of the appellant and the respondent, who were parties to the action and who, in view of the injunctions and damages sought in the claim and counterclaim, were necessary parties to the action, which was not fundamentally bad. If to prevent the action being defeated by asserting the servitude right it was necessary that the vendors should be joined as a party there existed ample power under Ord. XIV, r. 13, of the British Guiana Rules of Court, 1900 (which were so far as relevant substantially identical with the Rules of the Supreme Court in England), and rule 5 of the West Indian Court of Appeal Rules, 1945, to achieve that result, and those powers should have been exercised by the Court of Appeal in the circumstances of this case. The judgment of the Court of Appeal would be recalled, and the case remitted to that court with a direction to serve the notice of appeal on the vendors and thereafter to hear and determine the appeal on the merits.

Appeal (No. 8 of 1954) from a judgment of the West Indian Court of Appeal (November 14, 1952), setting aside a judgment of the Supreme Court of British Guiana (September 18, 1951) in favour of the present appellant and directing that the action and counterclaim be dismissed.

The following introductory statement is taken from the judgment of the Judicial Committee: Matters started with a writ of summons issued from the Supreme Court of British Guiana, dated December 19, 1947, by which the respondent claimed against the appellant (*a*) an injunction restraining the appellant from impounding any cattle or other animal the property of the respondent while grazing on any part of certain land known as Plantation Susannah, and (*b*) 1,500 dollars damages for his having between certain dates wrongfully and unlawfully seized or taken possession of 10 head of cattle the property of the respondent and caused them to be impounded. From the statement of claim it appeared that the respondent was the owner of two lots of land in the western half of Plantation Susannah and the appellant was alleged to be at all material times the beneficial owner and occupier in possession of the eastern half of the plantation. The respondent claimed under his titles to be entitled to graze his cattle over the whole of the eastern half of the plantation occupied by the appellant, and that was denied by the appellant. For the purposes of this appeal their Lordships of the Board found it unnecessary to go into the grounds on which that claim was asserted or denied or the limitations which the appellant pleaded in the alternative on the right claimed by the respondent, if the latter was found to have any right of pasturage over the eastern half of Plantation Susannah. It was necessary, however, to note that the appellant counterclaimed for (1) a declaration that the respondent's titles did not confer on him any right of grazing as claimed, and two further declarations in the alternative limiting the exercise of the right of grazing; (2) 500 dollars damages for trespass; (3) an injunction to restrain the respondent from continuing or repeating the trespasses; (4) further or other relief; (5) costs. Further procedure followed, after considerable delay, in the course of which the respondent gave notice that he would base his claim also on a prescriptive title, and ultimately by amended statement of claim dated May 18, 1951, he claimed (*a*) an injunction restraining the appellant from impounding any cattle or other animal the property of the respondent while grazing on the eastern half of Plantation Susannah; (*b*) a declaration that he had acquired a prescriptive right to depasture his cattle on the eastern half of the plantation; (*c*) payment by the appellant of 1,500 dollars as damages for the appellant's wrongful and illegal acts; (*d*) costs.

The following matter with reference to the appellant's title played a part of considerable importance in the course ultimately taken by the West Indian Court of Appeal. While the appellant claimed to be the beneficial owner and occupier of the eastern half of Plantation Susannah and to have been in possession thereof since June 25, 1947, he had not when the action was raised and had not yet obtained from the vendors, Bookers Demerara Sugar Estates Ld. (hereafter referred to as Bookers) a transport (i.e., a formal conveyance) of the land. That was known to the respondent before he started his action. The position was clear from two letters passing between the advisers for the respective parties. The first from the respondent's adviser to the appellant's solicitors was as follows:—

J. C.
1954

HANOMAN
v.
ROSE.

"10th December, 1947. Messrs. Cameron & Shepherd, 2 High "Street, Georgetown. Dear Sirs. Referring to my conversation "with your Mr. Edward de Freitas as regards the proposed "transport by Messrs. Booker Bros. McConnell & Co., Ld., to "Mr. G. Hanoman of the portion of Pln. Susannah Rust, Courantyne, Berbice, sold to him and with respect to which Mr. de "Freitas promised to furnish me with the date of the agreement "of sale. I shall be glad if I may be informed of this as early "as possible: and if, as I also understand, Mr. Hanoman has not "only already paid the purchase price of the property in full but "has also been put in possession, I shall also be glad if you will "now confirm these facts and so avoid any necessity for joining "Messrs. Booker Bros. McConnell & Co., Ld., in an action that "Mr. A. Rose and others propose to take against Mr. Hanoman "for certain acts of trespass committed by him. I remain, Yours "faithfully, Eustace G. Woolford."

The appellant's solicitors replied as follows: "Georgetown, "Demerara, British Guiana. 16th December, 1947. Sir Eustace "G. Woolford, K.C., O.B.E., Barrister-at-Law, Chambers, Charlotte Street, Georgetown. Dear Sir. Re: E.½ Pln: Susannah. "With reference to your letter of the 10th inst., our client, "Mr. George Hanoman, has instructed us to inform you that he "purchased the E½ of Plantation Susannah from Messrs. Bookers "Demerara Sugar Estates, Ld., on the 25th day of June, 1947, "that having paid the full purchase price he was given immediate "possession of the same and that he has been in possession since "then. Mr. Hanoman has also instructed us to say that there "will be no need to join Messrs. Bookers Demerara Sugar Estates "Ld. in the action which you say Mr. A. Rose and others propose "to take as that company has no beneficial interest whatsoever "in the above-mentioned property. Yours faithfully, Cameron "& Shepherd."

At the hearing before the trial judge a submission was made by junior counsel for the respondent that the counterclaim was bad because Bookers were not a party; but when his leader agreed with appellant's counsel that the correspondence showed that no point was to be taken that the appellant did not have his transport in implementation of his contract of purchase from Bookers the submission was withdrawn.

After evidence and a hearing lasting 26 days Boland Ag.C.J. (British Guiana) in a long and careful judgment, in which he considered all the issues between the parties, on September 18, 1951, dismissed the claim of the respondent (the plaintiff); entered judgment for the appellant (the defendant) on his counterclaim, with 200 dollars damages for the trespass by the respondent's cattle on the eastern half of the Plantation Susannah; made a declaration that, neither by virtue of transport, nor by virtue of prescription, was the respondent entitled to the servitude of grazing his cattle on the eastern half of the Plantation Susannah; and granted an injunction against the respondent, his servants or agents, from causing or permitting cattle to graze on the eastern half of the said plantation.

Against that judgment the respondent appealed to the West Indian Court of Appeal (Perez (C.J. Trinidad and Tobago), Jackson (C.J. Windward Islands and Leeward Islands), and Bell (C.J. British Guiana)). When the appeal came on for hearing the Appeal Court raised a preliminary point that the proceedings were wrongly constituted, because the defendant (the present appellant) was not the registered proprietor of the eastern half of Plantation Susannah. Proceedings were adjourned for consideration of that point by counsel. On resumption of the hearing the point was adopted by counsel for the plaintiff (the present respondent), while counsel for the defendant argued to the contrary and further submitted that, in any event, the court could direct that the registered proprietors, Bookers, should be served with notice of the appeal, if the court thought that they should be parties to the proceedings, pursuant to rule 5 (1) of the West Indian Court of Appeal Rules, 1945. That course, however, the Court of Appeal did not take. On November 14, 1952, on this preliminary point, the court dismissed the appeal; adjudged the action in the Supreme Court of British Guiana to be dismissed; set aside the judgment of Boland Ag.C.J. on the counterclaim; and ordered that no costs be allowed to either appellant or respondent in the Supreme Court, or in the Court of Appeal.

1954. Nov. 10, 11, 15. *Sir Andrew Clark Q.C.* and *G. C. D. S. Dunbar* for the appellant. The Court of Appeal were wrong in holding that the proper parties were not before the court—that one of the proper parties was missing—and they held that they were bound by a number of cases and had no option but to dismiss the appeal and the action. The cases which they cited had nothing to do with whether the wrong party was before the court, but were cases where the court had been asked to try a hypothetical case, which, of course, the court will not do. Here, all the proper parties were before the court. Even if that be wrong, and the Court of Appeal were right, they were not bound by those cases; they were bound by their own Rules of Court and could make the necessary amendment themselves—by adding the necessary party. No reference was made in their judgment to the appellant's counsel's application that notice of appeal should be served on Bookers pursuant to rules 5 (1) and 16 (1) of the West Indian Court of Appeal Rules, 1945, which provide respectively that "the Court of Appeal may direct notice of appeal to "be served . . . upon any person not a party . . . and may give "such judgment and make such order as might have been given "or made if the persons served with such notice had been "originally parties," and "The Court of Appeal shall have all "the powers and duties as to amendment or otherwise" of the Supreme Court. The "court" by definition includes a judge. So the Court of Appeal has the same duties as the court, and by Ord. 14, r. 13, of the British Guiana Rules of Court, 1900 (which so far as relevant are substantially identical with the Rules of the Supreme Court in England), "no action shall be defeated by "reason of the non-joinder of parties," and "the court may at "any stage of the proceedings order that the names of any parties "who ought to have been joined . . . in order to enable the court "effectually and completely to adjudicate upon and settle all "questions involved in the action be added." So there is a mandatory duty here to serve notice on Bookers, for otherwise they are defeating the proceedings by a mere non-joinder of parties.

None of the cases on which the Court of Appeal relied touch the case where the only defect is that one, but not both of the proper parties is before the court. Assuming that the Court of Appeal were right in saying that the legal owner was a necessary party, then they ought to have directed him to be added. It was said in *Fausett* v. *Mark*[1]: "It is not only competent but expe-"dient in the interests of justice that the Court of Appeal should "give effect to the law, whether the point has been raised at "the time or not." All that *Connecticut Fire Insurance Co.* v. *Kavanagh*[2] really amounted to was that the Board declined to allow the amendment from fraud to mere negligence at that stage in the court of last instance. In *Glasgow Navigation Co.* v. *Iron Ore Co.*[3] the House of Lords refused to decide a purely hypothetical question; it has nothing to do with the case of lack of a party. *Sun Life Assurance Company of Canada* v. *Jervis*[4] decided that the House of Lords will not review the decision of the court below when the dispute has already been settled; there was no longer any existing lis between the parties. It has no bearing whatever on the present matter, and follows the same general principle as in the *Glasgow Navigation* case[5]—that the House of Lords will not decide hypothetical cases. *Sutch* v. *Burns*[6] was again an action based on a hypothetical policy of insurance, and the court refused to entertain such an action.

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[1] [1943] L.R.B.G. 354, 360.

[2] [1892] A.C. 473; 8 T.L.R. 752.

[3] [1910] A.C. 293.

There is nothing in any of the above cases which has any bearing on the present case as it was in the West Indian Court of Appeal. This is simply and solely the case of a failure to join a necessary party, assuming that the legal owner was a necessary party. *Howden* v. *Yorkshire Miners' Association*[7] is an instance where this very thing was done in our courts: Ord. 16, r. 11, of the English Rules of the Supreme Court corresponds exactly with Ord. 14, r. 13, of the British Guiana Rules; and our Ord. 58, r. 2, corresponds with rule 5 (1) of the West Indian Court of Appeal Rules. That the same sort of thing is normally done in the case of Roman-Dutch law, where the registered proprietor has not been made a party in the first instance, is shown by *Nel* v. *Mellet.*[8] That case is not strictly in point because the South African Rules are very different from those now before the Board, and the present case is very much stronger. Here the Court of Appeal acted on the old basis as if this had been a plea in abatement.

The main submission is that Bookers were not a necessary party to this particular action; or that, at the most, the absence of the legal owner would have been a good ground—a proper ground—for the court in its discretion to refuse to grant a declaration, but it does not touch in any way any of the other relief. There was jurisdiction to grant the whole of the relief asked for by the appellant or the respondent without Bookers being joined as a party, or, alternatively, to grant the injunction and other relief claimed by the appellant or the respondent (other than a declaration) without Bookers being joined. *Fitzgerald* v. *Firbank*[9] shows that the owner of a fishery right is entitled to maintain an action against anyone who interferes with the enjoyment of the right, and that in such an action the question of the exact nature and extent of his right will be construed in the absence of the person who granted it. The Board should decide once and for all that Bookers are not a necessary party, or should direct the Court of Appeal to join them, otherwise this matter might have to be gone over again.

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[4] (1944) 60 T.L.R. 315.

[5] [1910] A.C. 293.

[6] [1944] K.B. 406; 60 T.L.R. 316; [1944] 1 All E.R. 520n.

[7] [1903] 1 K.B. 308, 341; 19 T.L.R. 193.

[8] [1912] S.C.R., C.P.D. 195, 201.

[9] [1897] 2 Ch. 96; 13 T.L.R. 390.

Although Roman-Dutch law does apply to the servitude, it does not apply to the law of real property or the law of trespass: Maasdorp's Institutes of South African Law, 7th ed., vol. 2, p. 28. The appellant can maintain an action for trespass and an injunction; but in seeking a declaration he is asking for the exercise of a discretion—no one has a legal right to a discretion. If there is anyone not before the court whose rights will be prejudicially affected by the declaration the court is loath to make it. The only declaration asked for here is that the respondent has no servitude over the land in the occupation of the appellant. If that declaration is made there is no one who would be prejudicially affected by it except the respondent. *Lategan* v. *Union Government*[10] shows quite clearly that where a person claiming a servitude says that someone else is preventing him from exercising it, his cause of action is against that person and not against the owner of the servient tenement. That case is direct authority that so far as the respondent's claim was for damages and an injunction Bookers were not only not a necessary party but they were not a proper party.

This appeal should be allowed, the order of the Supreme Court restored and the case remitted to the West Indian Court of Appeal with a direction to serve notice of appeal on Bookers and to hear and determine the appeal on its merits.

B. Gillis Q.C., *S. N. Bernstein* and *John Lloyd Eley* for the respondent. Every argument submitted before the trial judge, and every piece of evidence, related to the question whether or not servitude existed, and if it did, with what limitations, and a claim for damages for trespass was dependent on a decision on that question. And the claim for a declaration depended also on the answer to the question relating to servitude. Those being the issues, they are only open to the registered owners. It is not merely a technical matter, but goes to the root of the rights of the parties when a declaration is asked for. For the appellant to succeed in his action for trespass the court has to decide first whether the respondent's servitude exists and its extent. The Roman-Dutch law applies to this matter: Wille, Principles of

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[10] S.A.L.R. [1937], C.P.D. 197.

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South African Law, 3rd ed., p. 175; that passage is relied on, and it is based on *Setlogelo* v. *Setlogelo.*[11] Where litigation seeks to establish title to a servitude and its extent, the legal parties must be before the court. The position of the appellant here was that he paid the purchase price and had been put in possession, but he had not taken transport—he was entitled to call for transport, but it does not follow that he was anything other than a person in possession having made his payment. He was treated by the trial judge as if he had a better status. What was being litigated in *Lategan* v. *Union Government*[12] was not the existence and extent of a servitude, but the right to obstruct it. The disturber of a servitude is a proper defendant.

With regard to the submission for the appellant that the finding of trespass stands independently and should be sustained, the matter cannot be put clearer than as stated in the judgment of the Court of Appeal: "We are not unmindful of the fact "that the original cause of the action was the alleged trespass of "the plaintiff's cattle on the tenement of the defendant; that "question was never pursued at the trial. Whether the entry of "the cattle was or was not a trespass is so inextricably interwoven "in the case as presented with the existence or non-existence of "the servitude claimed that we are of the opinion that until "the question of servitude be considered with the proper parties "before the court the judge should have declined to decide the "question of trespass or no trespass."

The Rules of Court are not mandatory; a discretion remains in the court whether it will in all the circumstances exercise the various steps indicated: The Annual Practice, 1954, p. 253. It was open to the Court of Appeal to take no step under the British Guiana Rules of Court. That court was right, the proper parties were not before the court and this appeal should be dismissed.

S. N. Bernstein following. This appeal turns on Roman-Dutch law. At the trial, counsel for the respondent objected that the counterclaim could not be maintained as the appellant was not the proprietor of the land he occupied; but that objection was withdrawn on the assertion of counsel for the appellant that certain correspondence between the parties amounted to an agreement that that objection should not be taken. It is submitted that the correspondence has not the effect suggested; but in any case such an agreement could not vest the court with jurisdiction

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[11] [1921] S.C.R., Orange F.St. P.D. 161, 164.

[12] S.A.L.R. [1937], C.P.D. 197.

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to give relief to which the presence of the proprietors as a party was essential. Whenever a claim to a servitude arises it can only be brought against the registered owner of the servient tenement. The substance of the claim here is for a declaration. [Reference was made to *Gangadia* v. *Barracot*[13] and *Parikan Rai and La Penitence Estates Co. Ld.* v. *Douglas.*[14]] Those cases show the sanctity that attaches to registration and registered owner. Owing to that sanctity, when the right to a servitude is in question no action can be brought to test that question except against the registered owner. Bookers were an essential party; the respondent was suing the appellant as though he had a transport; that is the whole misconception in this case. The Board ought not to assume that the Court of Appeal did not consider the Rules of Court; their application is discretionary, and there is no evidence to show that they acted on any wrong principle of law.

Sir Andrew Clark Q.C. in reply. Roman-Dutch law does not apply: section 3 of the Civil Law of British Guiana Ordinance, 1917 (Laws of British Guiana, 1930 Rev., c. 7); the English common law and the English law of equity is substituted for Roman-Dutch law in relation to movable and immovable property and in the case of contracts. Sections 31, 32 and 33 of the Supreme Court of Judicature Ordinance, 1915 (Laws of British Guiana, 1930 Rev., c. 10) show that a person in occupation or beneficial ownership can maintain an action for trespass whether he be the registered owner or legal proprietor or not. Applying that here, whatever the rights and interests of the parties may have been in the matter there was power in the court to grant injunctions to restrain trespass. The best course is to remit the matter to the Court of Appeal with a direction to serve notice on Bookers.

December 14. The judgment of their Lordships was delivered by LORD KEITH OF AVONHOLM. This action, which comes before their Lordships' Board from the West Indian Court of Appeal, has taken an unfortunate course. Their Lordships are not concerned to discuss the merits of the action, which have not been considered by the Court of Appeal, and will confine their attention to what is relevant to the procedural issue which has led to the present appeal. [His Lordship stated the facts set out above and continued:] The ground on which the Appeal Court proceeded was that the proper parties were not before the court. What the plaintiff was claiming was a real or praedial servitude and the action, they held, should have been directed against the owner of the servient tenement. According to the law of the colony, they said, the term proprietor connotes legal owner and does not include beneficial owner. The judgment of the Court of Appeal contains the following passage: "According to the law of this " colony, the term proprietor connotes legal owner and does not " include beneficial owner. A transport of immovable property " vests in the transferee full and absolute title therein and it is " not lawful for any person in whom title of such property vests " to transfer it except by passing and executing a transport. See " *Parikan Rai and La Penitence Estates Co. Ld.* v. *Douglas*,[1] " where reference is made to the earlier case of *Gangadia* v. " *Barracot*,[2] where it was held that it is still necessary to complete " a sale by transport.

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[13] [1919] L.R.B.G. 216.

[14] [1926] L.R.B.G. 142.

" The action in this case proceeded by the consent of counsel " on both sides on the basis that the transfer from Bookers " Demerara Sugar Estates Ld. to the defendant had been " implemented by transport and as if the defendant was, in fact " and in law, the proprietor. The action was based upon a " complete misconception of the legal position of the defendant. " The proceedings were started and were continued upon that " basis from which the trial judge was led by both parties to " arrive at an erroneous conclusion as to their position.

" It is manifest therefore that if judgment had been given on " the claim for the plaintiff it would have been of no value as the " owner, i.e. the proprietor of the alleged servient tenement, " was not before the court and the judgment given in favour " of the defendant on the counterclaim in so far as it relates " to the declaration and injunction is of no value as the defendant " was not at the time and is not now the owner of the servient " tenement."

Later in the judgment it is said:

" We are not unmindful of the fact that the original cause " of the action was the alleged trespass of the plaintiff's cattle " on the tenement of the defendant; that question was never " pursued at the trial. Whether the entry of the cattle was or " was not a trespass is so inextricably interwoven in the case as " presented with the existence or non-existence of the servitude " claimed that we are of the opinion that until the question of

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[1] [1926] L.R.B.G. 142.

[2] [1919] L.R.B.G. 216.

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"servitude be considered with the proper parties before the "court the judge should have declined to decide the question of "trespass or no trespass."

In taking the course which they did the Court of Appeal proceeded on the authority of certain cases which their Lordships will examine in a moment and which, in their Lordships' view, have no application to the circumstances of this case. Their Lordships would, however, first mention two matters. It was maintained for the appellant before their Lordships' Board that the relevant law of the Colony in the matter of ownership of the alleged servient tenement was the common law of England applicable to personal property, by virtue of section 3 (D) of the Civil Law of British Guiana Ordinance, and that, as the appellant was put in possession of the eastern half of Plantation Susannah and had paid the full purchase price, the legal owner was no more than a trustee for him and the appellant was entitled to be treated as having the whole substantial right and interest of an owner to contest this action. This contention was not, however, fully developed and argued and it is not clear that it was advanced before the Court of Appeal, or considered there. Their Lordships are not prepared to express any opinion in this matter without having the views of the courts of the Colony in a case more appropriate to raise the question and on a fuller examination of the provisions of the Ordinance and of any relevant authorities. They would only observe that as the appellant appears to have the real interest to dispute the servitude it would be unfortunate if any technicalities as to his legal title should stand in the way. The other observation which their Lordships would make is that sufficient weight, on any view, does not seem to have been given by the Court of Appeal to the fact that the defendant was a necessary party to the action, and indeed the only proper party, so far as the claim for an injunction and damages for impounding the plaintiff's cattle was concerned. Equally the plaintiff was a necessary party to the counterclaim for trespass and damages. These claims may have been inextricably interwoven, as the Court of Appeal observes, with the existence, or non-existence, of the servitude claimed, and may have made it necessary, if the servitude was in dispute, to add another party to the action; but the omission of such party from the action could not, in their Lordships' view, make the action fundamentally bad. The authorities relied on by the Court of Appeal lead, in their Lordships' view, to no such result.

Fausett v. *Mark*[3] was a case where a plaintiff sued certain persons in the supposed character of executors, claiming, inter alia, that they should be ordered to pass transport of certain property to himself. The trial judge made this order. An appeal was taken by the unsuccessful defendants. The point was then taken by the plaintiff, and sustained by the Court of Appeal, that the defendants were not executors of the deceased to whom the property had belonged and so had nothing to convey. In these circumstances the Court of Appeal dismissed the action without costs to either side. There could be no question of adding another party in that case. The defendants had no title to the property at all and were the only persons who had been asked and refused to convey the property to the plaintiff. As matters then stood there was no lis to be litigated between the plaintiff and any other persons. The way in which the plaintiff could obtain transport of the property was necessarily dependent on considerations which could have no relation to the circumstances on which that action was based, and might never give rise to the necessity of an action at all. The action was from the beginning wrongly conceived and could not be corrected by the addition or substitution of any other party. The passage quoted by the Court of Appeal from the judgment in that case was apposite to the facts of that case but, in their Lordships' opinion, has no application to the circumstances of the present appeal. *Sun Life Assurance Company of Canada* v. *Jervis*[4] is another case which is plainly distinguishable from the present case. By the time parties in that case got to the House of Lords there was no subsisting lis between the parties. The respondent had obtained the relief sought in his action in the courts below and by the terms imposed by the Court of Appeal in granting leave to appeal to the House of Lords could not be deprived of that relief or of the costs whatever decision their Lordships reached, and was to get his costs of his appeal as between solicitor and client. The appellant accordingly was merely seeking a judgment on an academic question and that the House of Lords refused to entertain. So in *Glasgow Navigation Co.* v. *Iron Ore Co.*[5] and *Sutch* v. *Burns*,[6] where parties sought to obtain judgments on a set of suppositions, which were not in accordance with the facts, the actions were dismissed. In the former case Lord Loreburn L.C. stated that it was not the function of a court of law to advise parties as to what would be their rights under a hypothetical state of facts.

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[3] [1943] L.R.B.G. 354.

[4] [1944] A.C. 111; 60 T.L.R. 315; [1944] 1 All E.R. 469.

[5] [1910] A.C. 293.

[6] [1944] K.B. 406; 60 T.L.R. 316; [1944] 1 All E.R. 520n.

None of these decisions, in their Lordships' view, touches the present case. This is not a fictitious or hypothetical case. It is not vitiated by a fundamental nullity as in *Fausett's* case.[7] There is a real, substantial question to try directly affecting the rights of the appellant and the respondent. As regards the claims for an injunction and for damages they are the only possible parties, for it is their acts alone that are challenged. If the assertion or denial of a servitude right requires that Bookers should be made a party their Lordships see no good reason why this should not be done even at this late stage of the litigation. Nothing that has already been done could of course prejudice Bookers in the matter of pleading, leading further evidence, or otherwise, in any matter in which their interests are affected. Opportunity should accordingly, in their Lordships' opinion, be given to Bookers to intervene in the proceedings if they so desire.

In this connexion their Lordships' attention has been directed to the Rules of Court, 1900, in force in the Colony, which do not materially differ from, and in many instances are identical with, the Rules of the Supreme Court in England. Rules 13, 14 and 15 of Ord. XIV of these Rules provide as follows:—

"13. No action shall be defeated by reason of the misjoinder "or nonjoinder of parties, and the court may in every action "deal with the matter in controversy so far as regards the rights "and interests of the parties actually before it. The court or "a judge may, at any stage of the proceedings, either upon or "without the application of either party, and on such terms as "may appear to the court or judge to be just, order that the "names of any parties improperly joined, whether as plaintiffs "or as defendants, be struck out, and that the names of any "parties, whether plaintiffs or defendants, who ought to have "been joined, or whose presence before the court may be necessary in order to enable the court effectually and completely to "adjudicate upon and settle all the questions involved in the "action, be added. No person shall be added as a plaintiff or "as the guardian ad litem of a plaintiff under any disability, "without his own consent in writing thereto. Every party whose "name is so added as defendant shall be served with a writ of "summons or notice in manner hereinafter mentioned, or in such

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[7] [1943] L.R.B.G. 354.

"manner as may be prescribed by any special order, and the "proceedings as against such party shall be deemed to have "begun only on the service of such writ or notice.

"14. Any application to add or strike out or substitute a "plaintiff or defendant may be made to the court or a judge "at any time before trial, or at the trial of the action in a "summary manner.

"15. Where a defendant is added or substituted, the plaintiff "shall, unless otherwise ordered by the court or judge, file an "amended copy of the writ of summons, and serve such new "defendant with such writ or notice in lieu of service thereof in "the same manner as original defendants are served."

By r. 16 (1) of the West Indian Court of Appeal Rules, 1945, the Court of Appeal has all the powers and duties as to amendment and otherwise of the Supreme Court of the Colony. And under r. 5 (1) of its Rules the Court of Appeal may direct notice of an appeal to be served upon any person not a party and may give such judgment and make such order as might have been given or made if the persons served with such notice had been originally parties.

In their Lordships' opinion, for the reasons already given, there was here a real issue raised by the action which vitally affected the two persons who were parties to the action and who, in view of the injunctions and damages sought in the claim and counterclaim, were necessary parties to the action. If it is necessary to prevent this action being defeated that another party should be joined as a party there exists ample power under r. 13 of Ord. XIV of the Supreme Court Rules and r. 5 of the West Indian Court of Appeal Rules to achieve this result, and in their Lordships' view these powers should have been exercised by the Court of Appeal in the circumstances of the present case.

For these reasons their Lordships will humbly advise Her Majesty to allow the appeal, to recall the judgment of the Court of Appeal, to remit the case to the Court of Appeal with a direction to serve the notice of appeal on Bookers Demerara Sugar Estates Ld. and thereafter, subject to such further procedure as may be necessary and under reservation of all parties' rights and pleas, to hear and determine the appeal upon the merits. The respondent must pay the costs of the appeal to their Lordships' Board and the costs of the hearing which has already taken place in the West Indian Court of Appeal.

Solicitors: *Simmons & Simmons; Hy. S. L. Polak & Co.*

[HOUSE OF LORDS.]

H. L. (E.)*

1954
Oct. 21, 25
Dec. 1.

GEORGE WIMPEY & CO. LD. . . . APPELLANTS;

AND

BRITISH OVERSEAS AIRWAYS CORPORATION . . . . RESPONDENTS.

Limitation of Action—Joint tortfeasors—Contribution—Action against one tortfeasor statute barred—Any tortfeasor "who would if sued "have been liable"—Law Reform (Married Women and Tortfeasors) Act, 1935 (25 *&* 26 *Geo.* 5, *c.* 30), *s.* 6 (1) (*c*)*—Limitation Act,* 1939 (2 *&* 3 *Geo.* 6, *c.* 21), *ss.* 2, 21 (1), (2).

The Law Reform (Married Women and Tortfeasors) Act, 1935, s. 6 (1), provides: "Where damage is suffered by any person as a "result of a tort . . . (*c*) any tortfeasor liable in respect of that "damage may recover contribution from any other tortfeasor who "is, or would if sued have been, liable in respect of the same "damage . . ."

An employee of the respondent public authority, who was injured in 1949 in a collision between one of its vehicles and a vehicle owned by the appellant company, brought an action against the company more than 12 months after the accident, claiming damages for negligence. The company served a third party notice on the public authority claiming contribution under section 6 (1) (*c*) of the Act of 1935 in the event of its being held liable to the injured man. Later the public authority was joined as second defendant and pleaded as a defence to both the claim in the action and the third party proceedings that it was protected by section 21 (1) of the Limitation Act, 1939, in that the proceedings had not been "commenced before "the expiration of one year from the date on which the cause of "action accrued," i.e., the date of the tort. The trial judge found that the public authority was one-third and the company two-thirds responsible for the damage suffered. He gave judgment for the injured man against the company but held that his action against the public authority failed because it was statute barred. On the claim of the company to recover from the public authority one-third of the damages awarded:—

Held (*per* Viscount Simonds, Lord Reid and Lord Tucker; Lord Porter and Lord Keith of Avonholm dissenting), that the company was not entitled under section 6 (1) (*c*) of the Act of 1935 to recover contribution from the public authority.

Per Viscount Simonds and Lord Tucker. Section 6 (1) (*c*) does not admit a claim for contribution by one tortfeasor against another where that other has been sued by the injured person and found not liable.

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* *Present*: VISCOUNT SIMONDS, LORD PORTER, LORD REID, LORD TUCKER and LORD KEITH OF AVONHOLM.

H. L. (E.)

1954

George Wimpey & Co. Ld. *v.* British Overseas Airways Corporation.

Per Lord Reid. The words "if sued" in section 6 (1) (*c*) mean "if sued when the tortfeasor claiming contribution was sued" or "if sued when the claim for contribution was made"; on either meaning the appeal would fail.

Per Lord Porter and Lord Keith of Avonholm. The words "if "sued" refer to the time at which the cause of action arose.

Decision of the Court of Appeal (sub nom. *Littlewood* v. *George Wimpey & Co. Ld. and British Overseas Airways Corporation and British Overseas Airways Corporation* (*Third Party*)) [1953] 2 Q.B. 501; [1953] 2 All E.R. 915 affirmed.

Appeal from the Court of Appeal (Singleton and Morris L.JJ., Denning L.J. dissenting).

This was an appeal from an order of the Court of Appeal dated July 27, 1953, affirming the judgment of Parker J. in the Queen's Bench Division dated February 5, 1953, in an action between John Littlewood as plaintiff, the appellant company, George Wimpey & Co. Ld., and the respondent corporation, British Overseas Airways Corporation, as defendants and the respondent corporation as third parties. By his re-amended statement of claim in the action the plaintiff claimed against the appellant company and the respondent corporation as defendants damages for personal injuries alleged to have been caused by the negligence of the appellant company and further or alternatively by the negligence and breach of statutory duty of the respondent corporation. The plaintiff obtained judgment against the appellant company for £1,436 12s. 0d. and costs. His claim against the respondent corporation, who were admittedly a public authority within the meaning of section 21 of the Limitation Act, 1939, was dismissed as statute barred.

Under the Law Reform (Married Women and Tortfeasors) Act, 1935, the appellant company claimed by third party proceedings against the respondent corporation, as tortfeasors liable for the same damage, contribution to the damages which it was adjudged to pay to the plaintiff. Parker J. dismissed the claim of the appellant company against the respondent corporation as third party and the Court of Appeal affirmed that decision.

The facts, set out in paragraphs 3–10 of the appellants' printed case on the appeal to the House of Lords, were as follows:

"(3) On July 28, 1949, Littlewood, who was an aircraft "cleaner, was injured in the course of his employment by "B.O.A.C. at London airport when travelling upon a vehicle "known as a fork-lift, owned by B.O.A.C. and driven by another

" of their servants, as a result of a collision between this vehicle " and a motor-lorry owned by Wimpeys and driven by their " servant.

" (4) On April 26, 1951 (viz., more than one year after the " accident) Littlewood issued a writ against Wimpeys claiming " damages on the ground that the collision was caused by the " negligence of Wimpeys' servant in the driving of their motor-" lorry.

" (5) By their defence delivered on June 20, 1951, Wimpeys " denied negligence and among other things alleged that the " collision was caused by the negligence of the driver of the fork-" lift for which B.O.A.C. were responsible.

" (6) On July 6, 1951, Wimpeys issued a third party notice " addressed to B.O.A.C. claiming contribution or indemnity under " the 1935 Act in respect of the claim of Littlewood in the action " and in respect of costs.

" (7) On February 1, 1952 (viz., more than two and a half " years after the accident) Littlewood obtained leave to join " B.O.A.C. as co-defendants with Wimpeys in the action, and " on February 12, 1952, he delivered an amended statement of " claim wherein he alleged negligence and breach of statutory " duty under section 26 of the Factories Act, 1937, against " B.O.A.C.

" (8) Both in their defence to Wimpeys' claim in the third " party proceedings and in their defence to Littlewood's claim in " the action B.O.A.C. denied negligence and breach of statutory " duty and further pleaded that the claims were barred by lapse " of time by reason of the provisions of section 21 of the Limita-" tion Act, 1939.

" (9) Littlewood's action against Wimpeys and B.O.A.C. and " the third party proceedings between Wimpeys and B.O.A.C. " were heard together before Parker J. . . . and in his judgment " delivered on February 5, 1953, the learned judge held: (A) That " Littlewood was entitled to judgment in the action against " Wimpeys for £1,436 12s. 0d. damages with costs on the ground " that Wimpeys' servant had been negligent in the driving of " their motor-lorry; (B) that B.O.A.C. were entitled to judgment " against Littlewood in the action on the ground that his claim " against them was barred by section 21 of the Limitation Act, " 1939; (C) that Wimpeys were two-thirds to blame and B.O.A.C. " were one-third to blame for the collision which caused Little-" wood's injuries; (D) that in the third party proceedings B.O.A.C.

"were entitled to judgment against Wimpeys on the ground that "their claim to contribution failed because B.O.A.C. had in fact "been sued by Littlewood and held not to be liable to him "because of section 21 of the Limitation Act, 1939.

"(10) Wimpeys by notice dated March 10, 1953, appealed "from so much of the judgment of Parker J. as ordered in the "third party proceedings that judgment be entered for B.O.A.C. "against Wimpeys with costs. On July 27, 1953, the Court of "Appeal gave judgment affirming the decision of Parker J."

Kenneth Diplock Q.C. and *Stanley Rees* for the appellant company. The Act of 1935 is dealing with wrong-doers as tortfeasors and the position between tortfeasors themselves. The present question turns on the proper construction of section 6 (1) (*c*), and in reading it one must look at the mischief which the section was intended to cure. Previously the law as to contribution between joint tortfeasors gave the injured person the exclusive power to decide how the burden of compensating him should fall on the tortfeasors whose wrongful act had contributed to the damage. Accordingly, he might sue one to the exclusion of the others or, having brought an action against all, he might discontinue it against one only or, having recovered judgment against all, he might levy execution against one only. Thus the burden was not apportioned among all those at fault in accordance with fairness, having regard to their respective responsibility for the accident and the damage, the matter being left to the caprice of the injured person. If the section now in question is ambiguous, one should prefer a construction which cures the mischief to be dealt with rather than one which perpetuates it.

In section 6 (1) (*c*) the word "liable" is used to indicate both the tortfeasor by whom contribution is recoverable and the tortfeasor from whom it is recoverable. It may mean, as Denning L.J. was prepared to hold in this case, "responsible at law," and this description covers the case of a person who is so responsible even if the liability is unenforceable for technical procedural reasons. If this is the true meaning here, then B.O.A.C. were "liable" in respect of the damage done to the plaintiff even though on the expiration of one year after the accident he lost his right to sue them by reason of the Limitation Act. If, on the other hand, "liable" where it is used for the second time in section 6 (1) (*c*) means "held liable by a judgment," the result in the present case is the same. There is conferred a right to recover contribution from a tortfeasor who has not been sued. Though the subsection does not state expressly at what date the hypothetical action is to be assumed to have been brought, it is plain from the words "have been, liable" that it must be earlier than the date on which the question of the right to recover contribution arises. Common sense demands that the assumed date for the hypothetical action should be that at which the cause of action arose (i.e., immediately after the accident), since to assume that it was brought at a time when it was statute barred would be absurd. Or the words might also mean "if sued at some "time" or "if sued at the time most favourable to the plain-"tiff." The Act is satisfied if there is some time at which these respondents could have been sued and found liable. "If sued" cannot mean "if sued together with the first tortfeasor," since a tortfeasor may admit liability and pay damages without action brought, and the proper construction of the Act would give him the same right of contribution as if judgment had been given against him.

In section 6 (1) (*c*) the words italicized must necessarily be implied so that it should read: "any tortfeasor liable in respect "of that damage may recover contribution from any other tort-"feasor who is, or would if sued *at the date when the cause of* "*action on the part of the injured person arose* have been, *held* "liable *by judgment* in respect of the same damage." This construction would give a right to contribution from tortfeasors in two categories, viz., those who (*a*) are held liable by judgment in an action at the suit of the injured person in respect of the same damage, and (*b*) who have not been held liable by judgment but would, if sued by the injured person when his cause of action arose, have been held liable to him in respect of the same judgment. This would cover all the persons whose fault contributed to the damage, thus enabling the court, in accordance with section 6 (2), to apportion to each of them the pecuniary burden, "as may be found by the court to be just and equitable having "regard to the extent of that person's responsibility for the "damage." The respondents' contentions would prevent this being done here. If a tortfeasor from whom contribution is claimed falls within either category, that is enough. Here the respondents are within the second category.

In the Court of Appeal the majority held that the two categories should be (*a*) tortfeasors who had been sued and held liable, and (*b*) those who had not been sued by the injured person but would have been held liable if they had been sued. On that view the respondents were excluded because they had been sued and held not liable. Such a construction would involve writing further words into section 6 (1) (*c*), printed in square brackets, so that it would read: "any tortfeasor liable in respect of that "damage may recover contribution from any other tortfeasor "who is [sued and held liable by judgment] or [who has not "been sued but] would if [he had been] sued *at the date when* "*the cause of action on the part of the injured person arose* have "been, *held* liable *by judgment* in respect of the same damage." This would result in a gap in the category of tortfeasors from whom contribution can be recovered. It would restore the mischief which the section was meant to cure by allowing the injured person to determine how the pecuniary burden should be distributed among the tortfeasors. Here the appellants had a right to contribution when they issued the third party notice but, if the Court of Appeal is correct, they lost it subsequently simply because the plaintiff chose to add the respondents as defendants after his cause of action against them was statute barred. It is unnecessary to read into the Act words which produce this capricious result.

However this case had been conducted, it would be open to the appellants to sue the respondents and reopen the whole matter. It is res judicata between the plaintiff and the respondents but not between the appellants and the respondents. Judgment in favour of an alleged tortfeasor, against whom contribution is claimed, delivered in an action by the injured person is not res judicata as against the person claiming contribution, who is not in any way debarred from suing him as falling within the second category already referred to, viz., persons who have not been held liable but would, if sued at the proper time, have been held liable. It is irrelevant, for the purposes of contribution, whether or not there have been third party proceedings and also on what grounds the tortfeasor was held not liable to the plaintiff.

No right to contribution arises until the person seeking it has actually paid the damages awarded: *M'Gillivray* v. *Hope.*[1] In the action for contribution the cause of action did not arise earlier than the date when the judgment was given against the appellants, and accordingly their action was in time: see *Morgan* v. *Ashmore, Benson, Pease & Co. Ld.*[2] (disapproving *Merlihan* v.

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[1] [1935] A.C. 1; 50 T.L.R. 475.

[2] [1953] 1 W.L.R. 418; [1953] 1 All E.R. 328.

A. C. Pope Ld.[3]); *Wolmerhausen* v. *Gullick*[4] and *Robinson* v. *Harkin.*[5]

[*Knapp* v. *Railway Executive*[6]; *Hanson* v. *Wearmouth Coal Co. Ld.*[7]; *Drinkwater* v. *Kimber*[8] and *Broom* v. *Morgan*[9] were also referred to.]

As to third party proceedings, see Supreme Court of Judicature (Consolidation) Act, 1925, s. 39 (1) (*b*).

In summary, the word "liable" where it is used for the second time in section 6 (1) (*c*) means "held liable by judgment." But the presence of the words "if sued" does not compel one to read in the words required by the respondents' contention.

As to the date to be ascribed to the hypothetical action, there are three possibilities: (*a*) the time when the cause of action by the injured person arose; (*b*) the time when the injured person in fact sued the tortfeasor who is claiming contribution; (*c*) any time in the past between the date when the cause of action by the injured party arose and when the right to contribution must be determined: see *Morgan* v. *Ashmore, Benson, Pease & Co. Ld.*[10] The third is the one on which the appellants rely.

Melford Stevenson Q.C., *L. G. Scarman* and *J. Wilfrid Bourne* for the respondent corporation. The respondents having been sued to judgment and held not liable to the plaintiff, the appellants cannot recover contribution from them under section 6 of the Act of 1935. The words "if sued" in section 6 (1) (*c*) must necessarily refer to someone who has not been sued. This submission is the rock to which the appellants cling and it is supported by the use of the words in section 6 (1) (*a*), where they mean "if joined in the same action." The same meaning must be given to them in both places.

Where one finds that an action has in fact been brought and has in fact been determined in favour of the defendant tortfeasor one is relieved of the necessity of speculating as to the date at which the hypothetical action contemplated by the paragraph must have been started. Since the respondents were in fact held not liable to the plaintiff, they do not come within either of the classes of tortfeasors described in the paragraph, viz., those who are liable or those who, if sued, would have been liable. The proposition that the expression "if sued" postulates someone who has not been sued does not require the interpolation of any words at all into the paragraph.

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[3] [1946] K.B. 166, 170; 61 T.L.R. 508; [1945] 2 All E.R. 449.

[4] [1893] 2 Ch. 514; 9 T.L.R. 437.

[5] [1896] 2 Ch. 415; 12 T.L.R. 475.

[6] [1949] 2 All E.R. 508.

[7] (1939) 55 T.L.R. 747; [1939] 3 All E.R. 47.

[8] [1952] 2 K.B. 281; [1952] 1 T.L.R. 1486; [1952] 1 All E.R. 701.

[9] [1953] 1 K.B. 597; [1953] 1 All E.R. 849.

[10] [1953] 1 W.L.R. 418.

If it were necessary to assign a date to the hypothetical action, the proper date would be that on which the writ was issued in the plaintiff's action against the first tortfeasor. Further, it might be argued that, unless the right to contribution arises at the date of the tort, the meaning of the periods fixed by the Limitation Act would be inordinately delayed, seven years in the case of a public authority in the position of the respondents and 12 years in the case of an ordinary tortfeasor. However, though other facts might make it necessary to consider whether the words "if sued" had any temporal content, that does not arise here. Also for the purposes of the respondents' argument the cause of action in the claim for contribution may be treated as arising when judgment was given in favour of the plaintiff against the appellants.

The words of section 6 (1) (*c*) clearly mean what the respondents contend. It is the appellants who seek to insert into the Act words which are not there. It is immaterial what "liable" means in the first place where it is used. Only its meaning in the second place is relevant.

It would produce an undesirable result to hold that an action by a tortfeasor against a co-tortfeasor for contribution can succeed after the latter had for any reason been held not liable to the injured party.

In *Morgan* v. *Ashmore, Benson, Pease & Co. Ld.*[11] the relevant defendants had been struck out. [*Smith* v. *Selwyn* [12] was also referred to.]

Diplock Q.C. in reply. It is idle to contend that this House need not decide when the hypothetical action is to be taken as having been brought. The present question is one of construction and in order to construe this paragraph the House must give it a meaning applicable to all the cases to which it refers. One of the cases to be covered by it is that of the tortfeasor against whom contribution is claimed not having been sued at all. Thus the problem of the temporal element cannot be shirked. It is a vital element on which the construction of the paragraph depends. It is relevant on the construction of the paragraph whether "liable" where it is first used means "held liable by judgment." If it includes persons whose liability has been determined by admission, the respondents' solution cannot be right, since the word must mean "responsible at law." The meaning ascribed by the respondents to the words "if sued" in section 6 (1) (*a*) is not the necessary meaning at all. That is not the conclusion to be drawn from its object, which was to get rid of the rule in *Brinsmead* v. *Harrison*.[13]

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[11] [1953] 1 W.L.R. 418.

[12] [1914] 3 K.B. 98.

Their Lordships took time for consideration.

1954. Dec. 1. Viscount Simonds stated the facts and continued: My Lords, at the hearing of the action and of the appeal two questions were raised, upon which there was no argument before your Lordships, the first as to the date upon which Wimpeys' right to contribution arose and the second as to the period of limitation in respect of a claim for contribution against a public authority under section 21 of the Limitation Act, 1939. I am content to assume that the right to contribution arose at any rate not earlier than the date when the existence and amount of Wimpeys' liability to Littlewood was ascertained by judgment and that the relevant period of limitation was six years.

The third question remains and it turns upon the true construction of section 6 (1) of the Act of 1935. That subsection, so far as relevant, provides as follows: "Where damage is suffered "by any person as a result of a tort (whether a crime or not)— "(*a*) judgment recovered against any tortfeasor liable in respect "of that damage shall not be a bar to an action against any "other person who would, if sued, have been liable as a joint "tortfeasor in respect of the same damage; . . . (*c*) any tort-"feasor liable in respect of that damage may recover contribution "from any other tortfeasor who is, or would if sued have been, "liable in respect of the same damage, whether as a joint tort-"feasor or otherwise. . . ."

It may at once be observed upon this subsection that, whereas paragraph (*a*) relates to the rights of the injured person and substantially alters the law to his advantage, paragraph (*c*) relates to the rights of tortfeasors inter se and, to a greater or less degree, according to the interpretation which is put upon it, alters the law for the benefit of the tortfeasor who alone has been sued or against whom alone judgment has been recovered. How far Parliament has proceeded upon this path depends on the language of the Act. If I find its meaning sufficiently clear, I do not think it right to depart from it upon a speculation that it might have been wiser or more consistent to proceed further.

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[13] (1872) L.R. 7 C.P. 547.

The question of construction, as I see it, is whether section 6 (1) (*c*) can, according to its natural meaning, be so interpreted as to admit a claim for contribution by one tortfeasor against another when that other has been sued by the injured person and held not liable. I agree with Parker J. and Singleton and Morris L.JJ. in thinking that it cannot.

It appears to me that the first matter for consideration is what is the meaning of the word " liable " where it is secondly used in section 6 (1) (*c*) and I think it is plain beyond argument that it means held liable in judgment. No other meaning can reasonably be attributed to it in the context " would if sued " have been," for these words make a suit the condition of liability. I do not therefore think it necessary to discuss what the paragraph might mean if, as has been suggested, the word " liable " bore some other significance, the precise legal content of which I do not find it easy to define, such as " responsible at " law." If the word " liable " where secondly used in paragraph (*c*) bears the meaning which I have ascribed to it, I should be reluctant to give it any other meaning where it is first used in the same paragraph, nor do I think it unreasonable that the right of contribution between tortfeasors should be limited to the case where he who seeks contribution has himself been sued to judgment. In the view which I take it is immaterial whether the word, where first used, has the same meaning or another: if it were necessary for me to decide it, I should say it had the same meaning.

The question then can be simply stated. Contribution is recoverable from one who in an actual suit by the injured man has been held liable by judgment: it is recoverable from one who, if sued, would in that hypothetical suit have been held liable. Is it also recoverable from one who has been actually sued by the injured man and held not liable? It happens in the case under appeal that the reason why the party from whom contribution was claimed was held not liable was because the Limitation Act was successfully pleaded. But this is irrelevant to the issue. The same question would arise if the claimant tortfeasor alleged that the defence, though it succeeded on the merits, was successful only because the case had been inadequately presented or even because the judge or jury had taken a wrong view of it. It appears to me that a construction leading to such a result should only be accepted if the language fairly admits of no other meaning. But, so far from this being the case, in my opinion the subsection plainly contemplates two classes only of persons from whom contribution can be claimed, viz.: those who have been sued and those who have not been sued but would, if sued, be held liable. If the intention had been to include a third class of persons who, having been already sued and found not liable, might yet in hypothetical proceedings be sued a second time and then found liable (an extravagant intention, as it appears to me, to impute to the legislature) I should have expected to find it expressed in clear and appropriate language. Not only is it not so expressed, but on the contrary I find in the words actually used the clear indication that the class of persons who "if sued would have been liable" does not include persons who, having been sued have been held not liable. As Morris L.J. aptly put it,[1] the words "'if sued' "postulate the case of someone who has not been sued."

For these reasons I am in favour of dismissing this appeal and I do not find it necessary to discuss a question of great difficulty, viz., at what date is the hypothetical suit, in which "the other tortfeasor . . . would, if sued, have been liable," to be presumed to have been commenced, and I will say no more than that, having read and considered the opinion of my noble and learned friend, Lord Reid, I should upon this part of the case accept his conclusion though I find myself reluctantly differing from him upon the first and vital question.

Lord Porter stated the facts and continued: My Lords, at that time [when Parker J. gave judgment in the case] the period of limitation for an action against a public authority was one year and once it had been (as it was) held that B.O.A.C. were a public authority Littlewood's claim against them was bound to fail. The only questions which remained and remain for your Lordships' consideration are (1) whether Littlewood's failure to sue B.O.A.C. within one year precluded Wimpeys from claiming contribution against them, and (2) whatever be the result of that failure, whether the subsequent joinder of B.O.A.C. and the dismissal of Littlewood's action against them prevented Wimpeys from recovering in their claim to contribution.

The answer to these questions depends on the true construction of section 6 (1) (*a*) and (*c*) of the Act of 1935. It is in the

[1] [1953] 2 Q.B. 523.

following terms: "6. (1) Where damage is suffered by any "person as a result of a tort (whether a crime or not)—(*a*) judgment recovered against any tortfeasor liable in respect of that "damage shall not be a bar to an action against any other person "who would, if sued, have been liable as a joint tortfeasor in "respect of the same damage; . . . (*c*) any tortfeasor liable in "respect of that damage may recover contribution from any other "tortfeasor who is, or would if sued have been, liable in respect "of the same damage, whether as a joint tortfeasor or otherwise, "so, however, that no person shall be entitled to recover contribution under this section from any person entitled to be "indemnified by him in respect of the liability in respect of "which the contribution is sought."

Before I analyse the meaning of these provisions I think, in order to make my conclusion plain, it is desirable to set out the position of tortfeasors before the Act was passed and the mischief which the Act was designed to remedy.

The position as regards joint tortfeasors was that the person against whom the tort was committed could sue all or any one or more of them but, subject to certain exceptions not material to the present case, if he obtained a judgment against one only or against any number less than the whole, his remedy against others than that one or others than that number was thereafter barred. It did not matter that that one was or that that number were unable to answer for the damage sustained, the plaintiff had no further remedy.

Section 6 (1) (*a*) of the Act of 1935 was enacted in order to alter this result. Henceforward, the fact that the injured party had recovered judgment against one or more would not prevent his suing and obtaining judgment against the rest.

In this collocation the first use of the word "liable" must mean held liable in an action, because unless there is an action judgment cannot be recovered: the second "liable" preceded by the words "would if sued have been" might well be replaced by the words "any other guilty party" but is by implication limited to one who has not been sued. In such a case no question arises as to the time at which the tortfeasor would have been liable if sued: the injured party's rights against him would be barred as soon as the period of limitation had elapsed and that period would run from the date of the tort since his cause of action arose at that moment. After the Act had been passed, therefore, the only question would be: Has he brought the second action within the period of limitation during which he could sue the second joint tortfeasor? and this period would not be affected by his having already sued or recovered judgment against the first. The relief given under this paragraph is on behalf of the injured party and has no bearing upon the rights of the wrongdoers inter se.

Paragraph (*c*) dealt with this latter problem. Before the passing of the Act it was left to the claimant to choose his victim. The person sued, whether he was a joint or a separate tortfeasor, if he was implicated as being partly responsible for the accident, had to abide by that choice. The person damnified might sue one joint tortfeasor alone and so lay the whole burden of the wrongdoing on him, or, in the case of separate tortfeasors, might sue them one by one and recover from one alone or from such as he chose to execute judgment against, provided that he did not recover more than the greatest sum awarded or, against any defendant, more than was awarded in the action against him. The object of the Act was to cure this evil and to enable those upon whom the burden had been placed to recover a just proportion from those who shared the blame. No question arises in the present case as to what those proportions are; they have been settled by the learned judge who tried the case.

Unless some defence such as the Statute of Limitations was of avail to either of the parties, judgment, as has been said, could be obtained against each tortfeasor for the sum awarded against him and the plaintiff could then recover from each the whole sum awarded against him or such lesser sum as he chose to exact provided he did not recover in all more than the largest sum awarded.

In the present case it is unnecessary to deal with such complexities as arise where each may have paid part and the correct liability of each to the other is in question. The present is a simple case where one has paid the whole and seeks to recover from the other the proportion which the judge has decided represents his share of the blame.

The quantum having been determined, the only question is: can the party against whom judgment has been given recover contribution from the other who was in part the cause of the injury? The answer depends wholly upon the true construction of section 6 (1) (*c*) of the Act. I cannot myself gain much assistance from the terms of section 6 (1) (*a*). As I have indicated, it deals with an entirely different problem. It is not this first but the second portion of paragraph (*c*) which gives rise to the difficulty.

The learned judge and the Court of Appeal, if I understand them rightly, accepted the view that if the B.O.A.C. had not been joined as a defendant and held not liable as such, a right to contribution would have subsisted in Wimpeys.

Birkett J., in *Merlihan* v. *A. C. Pope Ld.*,[2] took, as I understand him, a different view. In his opinion, when section 21 (1) of the Limitation Act, 1939, enacts that: "No "action shall be brought against any person for any act done "in pursuance . . . of any public duty . . . or in respect of any "neglect or default in the execution of any such . . . duty . . . "unless it is commenced before the expiration of one year from "the date on which the cause of action accrued," the date to be considered both in the case of an action by the injured party and in the case of a claim by one of a pair of tortfeasors against the other for contribution is the date of the original tort and, therefore, if the party claiming contribution brings his claim after the time prescribed for limitation in the particular case he fails and fails nonetheless though he himself was not sued until after the time at which he could have brought an action against his co-tortfeasor because the limitation of time for bringing an action against that other was less than the limit of time afforded to him.

Cassels J., in *Hordern-Richmond Ld.* v. *Duncan*,[3] disagreed with this view, as did Donovan J. in *Morgan* v. *Ashmore, Benson, Pease & Co. Ld.*[4] Parker J. and all the members of the Court of Appeal in the present case appear to agree in this dissent. Substantially, their view was that Wimpeys were under no liability until judgment was given against them, that their cause of action arose then and not until then, and accordingly their cause of action against B.O.A.C. arose at that date. I need not, I think, set out the authorities and reasoning upon which these opinions are founded except to refer to such cases as *Wolmershausen* v. *Gullick*[5] and *Robinson* v. *Harkin*,[6] both of which were claims to contribution between co-sureties, and *M'Gillivray* v. *Hope*,[7] which was a claim involving the right of present and former employers to contribution inter se in respect of damages awarded to a workman employed by them consecutively.

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[2] [1946] K.B. 166; 61 T.L.R. 508; [1945] 2 All E.R. 449.

[3] [1947] K.B. 545; 63 T.L.R. 193; [1947] 1 All E.R. 427.

[4] [1953] 1 W.L.R. 418; [1953] 1 All E.R. 328.

[5] [1893] 2 Ch. 514; 9 T.L.R. 437.

[6] [1896] 2 Ch. 415; 12 T.L.R. 475.

[7] [1935] A.C. 1; 50 T.L.R. 475.

If this view be true, Wimpeys' liability did not come into existence until judgment had been given against them, and therefore they had whatever was the appropriate period of limitation from that date. What that appropriate period may be—whether it is a year because B.O.A.C. is a public authority and the action is brought in respect of any act, neglect or default or whether it is six years, because the claim is not in respect of any act, neglect or default, but for contribution—is immaterial in the present case inasmuch as Wimpeys made their claim to contribution in the original action before judgment was given.

The learned judge, however, and two members of the Court of Appeal decided against Wimpeys on another ground. They interpreted the Act as dividing the persons concerned into two classes, those who had been sued and those who had not. The B.O.A.C. were in the first class as they had been sued and escaped liability; they therefore could not be included in the second class because the words " if sued " excluded them from inclusion in it. The natural construction of the subsection, it was contended, was that it permitted contribution to be exacted from those who had been successfully sued in respect of the same tort or from those who had not been sued, but not from those who had been sued unsuccessfully. These last had been sued and held not liable; therefore they were not persons who would have been liable if sued. There was no " would have " about it; their nonliability had been established.

As I have indicated, some support for this view may be obtained if the provisions of section 6 (1) (*a*) are to be read as parallel to those of section 6 (1) (*c*). Speaking for myself, they seem to me to deal with two essentially different matters. In the first subsection there is only one person to sue and the person liable can only be sued, or not sued, as the case may be, by the person injured. In the second it has been held that those *who have not been sued*, but if sued would have been liable, alone were included. For myself, I see no reason for adding the words in italics, nor, on the other hand, would I bolster up the appellants' case by adding or implying " if sued in time." To me, the wording naturally refers to persons who were implicated in the tort. B.O.A.C. were implicated and therefore would have been liable if sued. Any additional words are, I think, unnecessary, but if I had to make any implication it would be to add the words " as a result of the commission of the tort " to the words " would have been liable if sued."

I prefer to interpret the subsection as it stands. It stipulates nothing as to time, but, to my mind, B.O.A.C. in terms come within the category of those who would have been liable if sued and, unless some qualification is placed upon those words, Wimpeys can recover the contribution they ask. In my view, the two types of person referred to are simply those who have been sued or those who would have been liable, if sued, and I see no reason for making the classes mutually exclusive.

I think I should qualify this opinion in one respect. If contribution is to be obtained, the tortfeasor who has not been sued and never could be sued by the plaintiff is not liable to contribute to the party held liable, e.g., the husband sues some wrong-doer in respect of a wrong for which his wife was partly responsible. In that case no contribution is recoverable because the wife would never, if sued, be liable.

I have reached my opinion as to the true construction of the Act upon its wording alone without adding to or subtracting from its phraseology, but if there is thought to be any ambiguity, then, in my view, that ambiguity should be resolved in favour of the appellants.

I have set out what I believe to be the object of the section. The anomalies of the construction adopted below are fully recognized by the learned judge. Its result is, in certain cases, to do away with the relief given. Before 1935 the injured party could, at his option, choose the party whom he wished to make liable and that party could obtain no redress from those implicated in the wrong. Under the construction adopted by the learned judge and the Court of Appeal in this case he can still do so, though it may take a little more ingenuity than once it did.

Nor am I moved by the suggestion that to allow the appeal would expose a public authority to the danger of being sued at least seven years after the event, i.e., six years before the action was brought and another one year until the Statute of Limitations had run in their favour, or by the fact that unless Birkett J.'s view be adopted, an ordinary tortfeasor whose limitation is six years may have to wait 12, viz., six whilst his companion in fault is sued and six more until that companion, having had judgment given against him, brings his claim for contribution. In fact so long a period is unlikely to elapse in either case. The party sued, whether his co-tortfeasor is sued at the same time or not, is likely, as soon as he can, and indeed as in this case he did as soon as he was sued, to bring in the other party alleged to be in fault by third party proceedings. Similar considerations, in my opinion, apply to the objection urged on behalf of the respondents that to allow an action by a tortfeasor against a co-tortfeasor for contribution after the latter had for any reason of fact or law been held not liable to the injured party would be an unexpected and undesirable result. I should feel the force of this argument more acutely if it were not a necessary result in some cases of the law as it stands. Two injured persons may sue separately and in different courts in respect of the same accident and upon identical facts. Yet one court may come to one conclusion and the second to another, a circumstance which has indeed occurred within my own experience.

But here, again, such an incident is unlikely to happen and the more unlikely in a case where there are two tortfeasors who may well both be liable and require contribution the one from the other. In such a case a third party notice will almost certainly be given at once and it is only in an exceptional case such as the present, where limitation of time is a factor in the decision, that any difficulty would arise.

In such circumstances as the present one party or the other must be at a disadvantage and, having regard to the language used and the mischief desired to be cured, both in construction alone and in case of ambiguity, I would allow the appeal.

Lord Reid stated the facts and continued: My Lords, the sole question in this appeal is whether the appellants having paid the damages awarded to Littlewood and having in their favour a finding that the respondents were one-third to blame for the accident to him, are or are not entitled under section 6 (1) (*c*) of the Act of 1935 to claim contribution from the respondents.

I think it necessary first to consider the proper interpretation of section 6 (1) of this Act without reference to the facts of this particular case. It is possible to find a construction of this subsection which would lead to a decision of the present case but which, in my opinion, would not be applicable to other cases to which the subsection must be applied. But such a construction is in my judgment to be avoided, and it is necessary to find a construction which is generally applicable.

The subsection appears to be intended to be generally applicable to cases in which one tortfeasor seeks to recover contribution "from any other tortfeasor who is, or would if sued have been, "liable in respect of the same damage". I agree with your Lordships that the word "liable" in this context must necessarily mean held liable by judgment, and, so reading the word, the subsection in my judgment first requires an answer to the question whether that other tortfeasor has already been held liable in respect of that damage. If he has, and if the other conditions of the section are satisfied, then the Act gives a right to contribution. But if he has not, a second question must be asked: would that other tortfeasor if sued have been held liable in respect of that damage? I do not think that it is disputed that this must mean if sued by the person who suffered the damage. But still there are many cases where that question as it stands cannot be answered Yes or No. A person may be held liable if sued at one time but not if sued at another time: for example, a person who would have been held liable if sued at an earlier date may at a later date have a good defence under the Limitation Act or because he has had his liability discharged by the grant to him of a release. If the subsection is to be capable of application to such cases the words "if sued" must have a temporal connotation. The words "would have been "liable" show that the hypothetical action must be supposed to have been brought at some time between the date when the damage was suffered and the date when the claim for contribution is determined, but, as I have said, that is often not sufficiently definite to enable the question to be answered. No matter what may be the true construction of the rest of the subsection, this difficulty remains, and if it is to be operative generally something beyond the bare words of the enactment must at this point be read into it. There are at least four possibilities. The meaning may be "would if sued immediately "after the damage was suffered have been held liable," or it may be "if sued when the tortfeasor claiming contribution was "sued," or it may be "if sued when the claim for contribution "was made" or it may be enough that there was at least some time between these dates when the action would have succeeded.

I can illustrate the practical difference between these interpretations by taking the facts of the present case but supposing that Littlewood had never added B.O.A.C. as defendants. If it had been realized that B.O.A.C. were protected by section 21 of the Limitation Act they never would have been added as defendants. The action by Littlewood against Wimpeys and Wimpeys' claim against B.O.A.C. for contribution would have been tried together and as B.O.A.C. had never been sued by

Littlewood it would, on any interpretation of section 6 of the Act of 1935, have been necessary to ask the question would B.O.A.C. if sued by Littlewood have been held liable to Littlewood, and it would have been impossible to answer that question in that form. If B.O.A.C. had been sued by Littlewood before July 28, 1950, they would have been held liable but if sued after that date they would have been held not liable. The Act of 1935 must, if possible, be construed so as to make it applicable to that case and it can only be made to apply by holding that in their context the words " if sued " mean if sued at some particular date or during some particular period.

Let me assume for the moment that the first of the four possible meanings which I have mentioned is held on a construction of the subsection as a whole to be the true meaning. The question then would be—would B.O.A.C. if sued by Littlewood immediately after the accident have been held liable to him; the answer would be yes and Wimpeys would be entitled to contribution.

Now let me take the facts of the present case. B.O.A.C. were sued by Littlewood but not until a defence under the Limitation Act was available to them and they were held not liable. So the first question—have they been held liable—must still be answered no. The second question must then be asked and it must still be the same as before—would B.O.A.C. if sued immediately after the accident have been held liable, and the answer must still be yes. " If sued " must still have the same meaning; its meaning depends on the construction of the subsection and cannot alter with the facts of the particular case.

The argument against this view is, as I understand it, that the words " if sued would have been liable " imply that that tortfeasor has not in fact been sued at any time. I would agree if the words " if sued " did not refer to any particular time. But if they must be construed as referring to a particular time then, in my view, all that can be implied from them is that that tortfeasor was not in fact sued at that time. If the time to which " if sued " refers were immediately after the accident then the fact that B.O.A.C. were sued unsuccessfully at the wrong time would not alter the fact that if sued at the right time they would have been held liable.

But if the true meaning of " if sued " is if sued at the time when the tortfeasor claiming contribution was being sued then the appellants in this case must fail and they must equally have failed if Littlewood had never sued B.O.A.C. at all. In neither case could there be an affirmative answer to either of the questions posed by section 6 (1) (*c*) because on that construction the second question would be—would B.O.A.C. if sued when Wimpeys were sued have been held liable?

It is therefore in my judgment necessary for the decision of this case to determine as a matter of construction to what period the words "if sued" refer, and that can only be determined by considering the subsection as a whole.

I begin by considering the terms of section 6 (1) (*a*). It is true that this only deals with joint tortfeasors and therefore has no application to the present case, but it may be important because in structure and phraseology it closely resembles subsection (1) (*c*). It provides: "Where damage is suffered by "any person as a result of a tort (whether a crime or not)—(*a*) "judgment recovered against any tortfeasor liable in respect of "that damage shall not be a bar to an action against any other "person who would, if sued, have been liable as a joint tortfeasor in respect of the same damage."

Before 1935 if judgment was recovered against one joint tortfeasor that judgment was a bar to any action against another joint tortfeasor even although no sum had been or could be recovered under that judgment. This provision removes that bar.

There are two points in subsection (1) (*a*) which should, I think, be noted. In the first place, the word "liable" occurs twice and in each case it is clear that it must mean held liable. And secondly, in the phrase "who would if sued have been "liable as a joint tortfeasor" it appears to me that "if sued" most probably means if he had been sued together with the tortfeasor first mentioned, because a person cannot properly be said to be held liable "as a joint tortfeasor" if he is sued alone. If that is right, not only must the words "if sued" here have a temporal connotation but they must refer to the time when the other tortfeasor was sued. But that conclusion depends on an assumption that the language of the provision is used accurately, and looking to the defective drafting of other parts of the subsection it would, I think, be unsafe to rely on any inference from the form of drafting of subsection (1) (*a*). With regard to subsection (1) (*b*) I need only observe that the word "liable" is there used in a context where it cannot possibly mean held liable. The context is "if more than one action is "brought . . . against tortfeasors liable in respect of the

" damage," and liable there can only mean against whom there is a cause of action. So on any construction of the subsection the word " liable " must be held to have quite different meanings in different places in the subsection. I am not prepared in this case to base my decision on any inference from similarities of expression in either subsection (1) (*a*) or subsection (1) (*b*).

Next I would consider the mischief against which subsection (1) (*c*) is directed. Before 1935 if separate torts by two different tortfeasors contributed to cause the same damage the plaintiff could, and I think commonly did, sue and get judgment against both tortfeasors in the same action. He could then proceed to recover the damages from whichever one he chose, and the tortfeasor who had been made to pay had no right to require the other to contribute. Plainly that was thought by Parliament to be unjust and that case is undoubtedly covered by the first alternative in subsection (1) (*c*) " any tortfeasor liable . . . may " recover contribution from any other tortfeasor who is . . . " liable in respect of the same damage." But a plaintiff might, and sometimes did, choose to sue only one when he might have sued and succeeded against both, and the second alternative— " any tortfeasor liable . . . may recover contribution from any " other tortfeasor who . . . would if sued have been liable in " respect of the same damage "—is, I think, designed to cover that case. The second tortfeasor is put in no worse position than he would have been in if the plaintiff had taken the ordinary course of suing both.

But in cases like the present the position is very different. By virtue of statutory protection when a year had elapsed without the plaintiff raising any action B.O.A.C. had a complete defence against him and before 1935 would have been free of all liability. If the appellants' argument is right, in effect Parliament in 1935 partially withdrew that statutory protection and B.O.A.C. although not sued within the year would now be liable to make a payment in respect of the damage caused by their negligence. It is true that they are not liable to the plaintiff directly, but Wimpeys could only recover from B.O.A.C. because the negligence of B.O.A.C. caused damage to Littlewood.

If it had been intended to modify in this way the statutory protection afforded by an earlier Act I would have expected at least some indication of such an intention in section 6. But I can find none. The words of subsection (1) (*c*) are amply satisfied if " if sued " is held to mean " if sued at the time "when action was being taken against the other tortfeasor." I have said that for other reasons "if sued" must have a temporal connotation and, if that be so, then it seems to me that, if one merely looks at the context, that is at least as likely a connotation as any other.

Counsel for the appellants first argued that "if sued" should be held to mean "if sued immediately after the accident," but ultimately, and I think wisely, preferred the meaning "if sued at "some time" or "if sued at the time most favourable to the "plaintiff." That argument can be supported on two grounds. If one looks at the matter from the point of view of the tortfeasor claiming contribution it can be said that if the statute prevents him from being prejudiced by the whim of the plaintiff in choosing to make him pay when both have been held liable or in choosing to sue him alone when both could have been sued successfully then it would be reasonable that it should also prevent him from being prejudiced by the plaintiff choosing to delay bringing his action until a time when the other tortfeasor has a statutory defence.

The second argument in favour of the appellants' contention arises in this way: a tortfeasor instead of waiting to be sued may admit liability and pay damages, and it is said that the statute should be so construed as to entitle him to the same contribution from a second tortfeasor as he would have been entitled to if the plaintiff had sued him and obtained judgment. If that is right, then the words "if sued" cannot mean "if sued together with "the first tortfeasor" and, it is said, they must therefore have the meaning for which the appellants contend. But subsection (1) (*c*) could mean that a tortfeasor can recover contribution from another tortfeasor if the latter would, if sued by the plaintiff at the time when the former tortfeasor claims contribution, have been held liable; and that would avoid this difficulty. It is not necessary in the present case to decide whether this or "if sued "when the tortfeasor claiming contribution was sued" is the true meaning. On either meaning this appeal would fail and this question may arise for decision in some future case.

I think that there is much force in the appellants' arguments, and without the aid of more general considerations I would find the case narrow and difficult. But, viewing the case as a whole, there is one matter which confirms me in my opinion. I think that it is clear that the draftsman of section 6 failed to notice that cases like the present might occur and failed to make any express provision for them. This is therefore an example of the not uncommon situation where language not calculated to deal with an unforeseen case must nevertheless be so interpreted as to apply to it. In such cases it is, I think, right to hold that, if the arguments are fairly evenly balanced, that interpretation should be chosen which involves the least alteration of the existing law. If the appellants are right the effect of section 21 of the Limitation Act, 1939, would be considerably modified but that is not so if the respondents are right. I am accordingly of opinion that the appeal should be dismissed.

Lord Tucker. My Lords, this appeal raises a short point of construction. The words which fall to be construed are contained in section 6 (1) of the Law Reform (Married Women and Tortfeasors) Act, 1935, and so far as material are as follows: "Where damage is suffered by any person as a result of a tort ". . . (*c*) any tortfeasor liable in respect of that damage may "recover contribution from any other tortfeasor who is, or would "if sued have been, liable in respect of the same damage, "whether as a joint tortfeasor or otherwise. . . ." [His Lordship stated the facts and continued:] My Lords, I understand that all your Lordships agree with the trial judge and the majority of the Court of Appeal that the word "liable," where it appears for the second time in paragraph (*c*) of subsection (1) must, owing to the presence of the words "would if sued have been," mean "held liable." I agree, and accordingly pass to consider the construction of the subsection on this basis.

The construction which has prevailed below is that the subsection draws a distinction between persons who have been sued and those who have not been sued. Contribution may be recovered against the former if they have been held liable in the suit, and against the latter if they would have been held liable had they been sued. There are two separate and exclusive categories. If an alleged tortfeasor comes into the first category his liability to make contribution will be conclusively determined by the result of the suit. If he is in the first category it is immaterial to speculate what his fate would or might have been if he had fallen in the second category.

For the appellants it was contended by Mr. Diplock that such an interpretation necessitated the addition of the words "is "sued and held liable or who has not been sued but would if he "had been sued have been held liable," whereas the language of the second part of the subsection without the addition of any words was apt to include persons who had in fact been sued and held not liable but who would if sued, at some other time, or in another action on different evidence, now shown to have been available, have been held liable. The judgment in favour of the alleged tortfeasor against whom contribution is claimed (whom I will refer to for convenience as the "contributor") not being res judicata as against the person claiming contribution (whom I will call "the claimant") there is—it is said—no impediment in the way of the claimant bringing the contributor within the second limb of the subsection notwithstanding that he cannot be brought within the first limb.

My Lords, this seems to me to do violence to language which is tolerably plain—albeit inapt to cover a situation clearly never envisaged by those responsible for its enactment. It is to be remembered that this Act is giving to the claimant a new cause of action against the contributor which did not previously exist, and it would, in my view, require very clear language to lead to the conclusion that in addition to the categories consisting of (1) those sued and held liable, and (2) those not sued but who, if sued, would have been held liable, there is to be added a third class consisting of those who have been sued and held not liable but who may now be proved liable in further proceedings.

The construction which found favour with the trial judge and has been approved by the majority of the Court of Appeal appears to me—with due deference to those who take a different view—to give effect to the natural meaning of the subsection read as a whole without requiring the addition of further words. The words "if sued" necessarily involve a contrast between those who have been sued and those who have not been sued and cannot, in my view, be read so as to include persons who have been sued.

Taking this view of the construction of the subsection, I find it unnecessary to express any opinion as to whether the word "liable" where it first appears in paragraph (*c*) is to be confined to those already "held liable" by judgment, or with regard to the date of the hypothetical action contemplated in the case of persons who have not been sued and fall in the second category. Nor is it necessary to consider the date at which the cause of action afforded by the Act of 1935 in favour of the claimant accrues against the contributor or the period of limitation applicable to such claims, but I am not to be taken as in

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any way dissenting from the views on these matters expressed in the Court of Appeal.

My Lords, I would dismiss this appeal.

LORD KEITH OF AVONHOLM stated the facts and continued: My Lords, your Lordships are not now concerned with a question which was considered in the courts below, namely, when the cause of action in the claim for contribution accrued. It is conceded, in conformity with the view taken by the Court of Appeal, that the cause of action accrued at earliest at the date when judgment was given in favour of Littlewood against the appellants. As third party proceedings were already in being at that time no plea under the Limitation Act, 1939, could be available to the respondents against the appellants.

That leaves for consideration the question whether the judgment for the respondents in Littlewood's action is a conclusive answer to the appellants' claim for contribution.

The answer depends on what is the proper construction to be put on subsection (1) (*c*) of section 6 of the Law Reform (Married Women and Tortfeasors) Act, 1935. Agreeing on this point with my noble and learned friend, Lord Reid, I find myself unable to approach this matter in the way in which it was dealt with by the Court of Appeal. The material words are: "Where damage "is suffered by any person as a result of a tort (whether a crime "or not) . . . (*c*) any tortfeasor liable in respect of that damage "may recover contribution from any other tortfeasor who is, or "would if sued have been, liable in respect of the same damage, "whether as a joint tortfeasor or otherwise . . ." The appellants are clearly torfeasors liable in respect of the damage suffered by Littlewood. The respondents have been held not liable. But that does not, in my opinion, conclude the matter. They have been held not liable on the technical plea that the action so far as directed against them was out of time. The learned judge who tried the action was of the view that on the merits of the action they were blameworthy to the extent of one-third. The argument that commended itself to the majority of the Court of Appeal is that the words "would if sued have been liable" do not apply to the respondents because they have been sued and found not liable; and the words "who is liable" are equally inapplicable because they have been found not liable. But that is not the true issue. The question is to what point of time do the words "would if sued" refer? If Littlewood's suit had commenced six months after the action a different judgment would have been given from that which was given in the suit which began two years six months after the accident. The contention for the appellants is that if there was some point of time at which the respondents could have been sued and found liable the words of the statute are satisfied. If the appellants are right it is no answer to say that the respondents were sued at some other point of time at which they could not be held liable. That fact is quite irrelevant. The point would be obvious if the Act had said "would if sued when the cause of action arose." As the words must have the same meaning in all circumstances it is necessary, in my opinion, to arrive at some conclusion as to what period of time the legislature had in view.

In this matter some assistance is to be got, in my opinion, from other parts of section 6 of the Act. In subsection (1) (*a*) the same words are used: "judgment recovered against any tort-"feasor liable in respect of that damage shall not be a bar to an "action against any other person who *would, if sued, have been* "*liable* as a joint tortfeasor *in respect of the same damage.*" The language is curious. It contemplates the possibility of an action by an injured party against a person liable as a joint tortfeasor and at the same time regards him as having been sued by the injured party in a hypothetical action in the past. But the purpose of the provision is clear. It is to get rid of the rule settled since *Brinsmead* v. *Harrison*.[8] There Blackburn J. said: "Is it for the general interest that, having once established "and made certain his right by having obtained a judgment "against one of several joint wrong-doers, a plaintiff should be "allowed to bring a multiplicity of actions in respect of the same "wrong? I apprehend it is not; and that, having established his "right against one, the recovery in that action is a bar to any "further proceedings against the others." Having this passage and the provision of the statute in view it seems to me clear that the hypothetical action envisaged by the statute is an action that could be competently raised against one joint tortfeasor if there was no bar in the shape of a judgment recovered against another joint tortfeasor. This hypothetical action does not appear to me to be tied to any point of time other than that when the cause of action arose. I see no reason why it should be tied to the date of the commencement of the action against the tortfeasor first sued. If there are any limitation pleas or other pleas in bar which can be stated by the second tortfeasor they will be available to him in the action actually raised and no purpose would be served by considering them with reference to the hypothetical action. This hypothetical action, in my opinion, must be regarded in isolation as if it were the only action raised by the injured party. The reference to joint tortfeasors in the subsection indicates the kind of tort with which the subsection is concerned and not the kind of decree that might be obtained if both tortfeasors were sued jointly in one action. Subsection (1) (*b*) itself speaks of separate actions against persons liable as joint tortfeasors, and in subsection (1) (*a*) I see no necessity to read similar words as referring to a hypothetical action in which one joint tortfeasor is sued along with another joint tortfeasor in the same action. The words " if sued " need not therefore be read as meaning if sued at the date of the action in which judgment was recovered against the other tortfeasor.

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[8] (1872) L.R. 7 C.P. 547, 553.

The position is clearer when subsection (1) (*c*) is considered. This provision is not limited to joint tortfeasors. It expressly covers liability " as a joint tortfeasor or otherwise." It was always open to an injured party to sue tortfeasors who were not joint tortfeasors in separate actions so long as judgment against one of the tortfeasors was not satisfied. Accordingly, in my opinion, there is no reason for holding that in subsection (1) (*c*) the words " would if sued " mean if sued at the same time or in the same action as the tortfeasor seeking contribution was sued.

This view is, in my opinion, supported by another consideration. The word " liable " appears twice in subsection (1) (*a*), once in subsection (1) (*b*), and twice in subsection (1) (*c*). The word " liability " also appears in subsection (1) (*c*) and subsection (2). It is clear that " liable " does not mean the same thing in all these instances. Where used second in subsection (1) (*a*) and subsection (1) (*c*) it clearly means " found liable." In subsection (1) (*b*) it clearly cannot have that meaning. It means there no more than " liable in respect of the damage " as the Act says, or liable to have a decree entered against him if sued to judgment. Where at the beginning of subsection (1) (*c*) there are found the precise words used in subsection (1) (*b*) " tortfeasor " liable in respect of that damage " I am unable to give the

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words a different meaning from what they have in subsection (1) (*b*). I reach the result that "liable" where first found in subsection (1) (*c*) does not mean "found liable." If so, the words "would if sued have been liable" cannot be read as "would if "sued have been found liable in the same action in which the "tortfeasor seeking contribution was found liable." The date to be attached to the words "if sued" is thus thrown completely loose and, in my opinion, the words should be referred to a time at which the words will be given efficacy in all cases, a time at which the question of liability for the damage can be the sole issue to the exclusion of all special defences. I would only add that the word "liability" where found in the section seems to me to strengthen the view I take of the meaning of "liable" at the outset of subsection (1) (*c*) as do also the reasons given by Denning L.J. in the Court of Appeal.

As it is conceded that the cause of action in an action for contribution does not arise earlier in this case than the date when judgment was given against the appellants it follows that the action for contribution from the respondents is in time. It may seem a strange result that the action by the injured man against the respondents failed for being out of time and that the action for contribution against them is in time. But no question of policy in this matter can, in my opinion, be appealed to as an aid to arriving at the proper construction of the statute. The apparent anomaly results from the cause of action in the two cases being ascribed to a different point of time. It is to be observed further that the construction of the statute contended for by the respondents would put it in the power of the injured party, whether by accident or design, to determine in many cases whether contribution could be got or not.

I would allow the appeal.

Appeal dismissed.

Solicitors: *Stanley & Co.; J. H. Milner & Son.*

KURUMA, SON OF KANIU . . . . . APPELLANT;

AND

THE QUEEN . . . . RESPONDENT.

J. C.*

1954 Dec. 8.

1955 Jan. 11.

ON APPEAL FROM THE COURT OF APPEAL FOR EASTERN AFRICA.

East Africa (Kenya)—Criminal Law—Evidence—Illegally obtained—Test of admissibility—Relevance to matters in issue—Principle applicable in both civil and criminal cases—Rule as to admissibility of confessions not qualified—Search without warrant—Illegal possession of ammunition—Reference to Home Secretary—Emergency Regulations, 1952 (*Kenya*). *regs.* 8*A* (1) (*b*), 29.

Criminal Law. ; Privy Council—Reference to Secretary of State.

The test to be applied, both in civil and in criminal cases, in considering whether evidence is admissible is whether it is relevant to the matters in issue. If it is, it is admissible and the court is not concerned with how it was obtained.

While that proposition may not have been stated in express terms in any English case, it is supported by *Reg.* v. *Leatham* (1861) 8 Cox C.C. 498, *Lloyd* v. *Mostyn* (1842) 10 M. & W. 478 and *Calcraft* v. *Guest* [1898] 1 Q.B. 759; and also by the Scottish cases of *Rattray* v. *Rattray* (1897) 25 Rettie 315, *Lawrie* v. *Muir*, 1950 S.C.(J.) 19 and *Fairley* v. *Fishmongers of London*, 1951 S.C. (J.) 14. And in *Olmstead* v. *United States* (1928) 277 U.S. 438 the Supreme Court of the United States of America were of opinion that the common law did not reject relevant evidence on the ground that it had been obtained by illegal means.

There is no difference in principle for this purpose between a civil and a criminal case, though in the latter the judge always has a discretion to disallow evidence if the strict rules of admissibility would operate unfairly against an accused person: *Noor Mohamed* v. *The King* [1949] A.C. 182, 191–2; 65 T.L.R. 134; [1949] 1 All E.R. 365; *Harris* v. *Director of Public Prosecutions* [1952] A.C. 694, 707; [1952] 1 T.L.R. 1075; [1952] 1 All E.R. 1044.

The Board were not qualifying in any degree the rule of law that a confession could only be admitted if it was voluntary, and one obtained by threats or promises held out by a person in authority was not to be admitted: *Reg.* v. *Thompson* [1893] 2 Q.B. 12; 9 T.L.R. 435.

Where, therefore, on the trial of the appellant on a charge of being in unlawful possession of ammunition contrary to regulation 8A (1) (*b*) of the Emergency Regulations, 1952, of Kenya, evidence of their search of, and of the finding of the ammunition on, the appellant was given by two police officers who, not being of or above the rank of assistant inspector, had (it was alleged) by virtue

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* *Present*: LORD GODDARD C.J., LORD OAKSEY, MR. L. M. D. DE SILVA.

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of regulation 29 of the Emergency Regulations no power to search the appellant, the evidence was properly admitted.

As certain matters of fact in the case caused the Board some uneasiness, though they were not of a nature which according to the settled practice of the Board would entitle them to allow the appeal, the Board directed that they should be called to the attention of the Secretary of State and that the sentence of death which had been passed on the appellant should not be carried out until the Secretary of State had had an opportunity of considering the case.

Judgment of the Court of Appeal for Eastern Africa affirmed.

APPEAL (No. 35 of 1954), in forma pauperis by special leave, from a judgment of the Court of Appeal for Eastern Africa (Nihill P., Worley V.-P. and Briggs J.A.) (March 27, 1954) dismissing an appeal from a conviction by an Emergency Court of Assize at Nairobi in Kenya (Law Ag.J., sitting with three assessors) (February 11, 1954) whereby the present appellant was convicted of being in unlawful possession of two rounds of ammunition contrary to regulation 8A (1) of the Emergency Regulations, 1952, of Kenya, and sentenced to death. The ground on which leave had been obtained was that the evidence proving that the appellant was in possession of the ammunition had been illegally obtained and should not have been admitted.

By regulation 29 of the Emergency Regulations (omitting words immaterial for the present case), which formed the ground on which the objection was taken: " any police officer of or above " the rank of assistant inspector with or without assistance and " using force if necessary . . . may stop and search . . . any " individual whether in a public place or not if he suspects that " any evidence of the commission of an offence against this " regulation is likely to be found on such . . . individual and " he may seize any evidence so found."

The following facts are taken from the judgment of the Judicial Committee: On the day in question the appellant, hitherto a man of good character, had leave of absence from the European farmer by whom he was employed to visit his reserve. About 10 a.m. he started off on his bicycle along a main road on which he knew there was a road block where he would be liable to be stopped and searched. That was not the only way to his reserve; he could have gone by another route where he would not have encountered a road block. At the block he was stopped and police constable Ogwang examined his papers, which were in order, and then ran his hands over the outside of the appellant's clothing. According to his evidence, believing that he felt in the fob pocket of the appellant's shorts what seemed to be a pocket knife and ammunition he blew his whistle to summon a superior officer, Rattan Singh. Neither of those police officers was of or above the rank of assistant inspector. They said that the prisoner was taken by them to an enclosure where he was made to take off his shorts, which were then shaken and a pocket knife and two rounds fell out. He was then taken to the police station and charged with the offence. The two rounds were marked and were subsequently produced in evidence.

1954. Dec. 7, 8. *Dudley Collard* for the appellant. The appellant having been searched by a police constable (Ogwang) without a warrant, whereas under regulation 29 of the Emergency Regulations only a police officer of or above the rank of an assistant inspector had the power of search, the evidence obtained in the course of and by means of that illegal search was inadmissible. The case is put on two grounds: (1) on considerations of public policy the court ought to exclude evidence secured by that means; (2) if the rule of law is not an absolute one, at any rate the exclusion of such evidence is a matter of discretion, and the trial judge and the Court of Appeal ought here to have excluded it. There were striking discrepancies in the evidence. There is no positive authority one way or the other in this country on the admission of evidence obtained by illegal means; *Elias* v. *Passmore* [1] is not authority for its admission. The United States courts have evolved the absolute rule excluding evidence where it appears to have been obtained by some illegal action on the part of a government official. The clearest line of authorities is that of Scotland.

It is submitted (1) that if evidence is obtained in the course of and by means of an illegality, then it ought to be excluded; (2) the court ought not to countenance or appear to be countenancing the commission of an illegal act [*Ibrahim* v. *The King* [2] was referred to]; (3) the court ought not to encourage in future similar illegalities; (4) evidence obtained in consequence of an illegal search may be untrustworthy; and (5) the victim of the illegality has no other effective redress. There are some qualifications to the main broad proposition; e.g., perhaps the rule ought to be limited to evidence of servants of the Crown; and possibly it is not always that the illegality affects the value of the testimony.

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[1] [1934] 2 K.B. 164; 50 T.L.R. 196.

[2] [1914] A.C. 599, 613–4; 30 T.L.R. 383.

With regard to the American cases, it is submitted that their Constitution on these matters is the same as the common law of England. It was said by Holmes J. in *Olmstead* v. *United States*,[3] where their previous decisions are reviewed in a conveniently concise way, that "the Government ought not to use "evidence obtained and only obtainable by a criminal act." See, also, *Wolf* v. *Colorado*.[4] It would be a heartening thing if this Board, sitting as the supreme tribunal of so many English-speaking peoples, were to hold that the rule adopted by the Supreme Court of the United States excluding evidence which appeared to have been obtained by some illegal action on the part of a government official is also part of the law of England.

The Scottish cases suggest that there is a discretion in the court whether to admit this evidence or not, and they say that one of the tests is fairness to the accused; it does seem that neither the trial judge here nor the Court of Appeal ever considered that question: *Rattray* v. *Rattray*[5]; *Crook* v. *Duncan*[6]; *Hodgson* v. *Macpherson*[7]; *Adair* v. *M'Garry*[8]; *H.M. Advocate* v. *M'Guigan*[9]; *Robertson* v. *Watson*[10]; *Lawrie* v. *Muir*[11]; *M'Govern* v. *H.M. Advocate*[12]; *Fairley* v. *Fishmongers of London*[13] and *H.M. Advocate* v. *Turnbull*.[14] There are also two South African cases which contain statements of general principle which require consideration in this case: *Rex* v. *Maleleke*[15] and *Rex* v. *Mabuya*.[16]

Summarizing; where evidence is tendered by the prosecution in a criminal case which has been obtained directly by illegal means, it is not admissible. That is an absolute rule which, while there is no direct authority on it in England, has the support of two Scottish Law Lords and of the Supreme Court of the United States. The rule has the merit of simplicity and is relatively easy to apply, and it would have a salutary effect on any police force. It would be a degrading position for the court to be in, where evidence had been illegally obtained, to have to say: "You "have committed every crime in the calendar, and broken all the "Ten Commandments, but that does not concern us." As an intermediate position between the American and the Scottish views, it is suggested that there is the absolute rule unless the prosecution satisfy the court that there are circumstances excusing the irregularity and justifying the admission of the evidence. That would really meet all objections. If the Board think that there is a discretion, then it is submitted that the evidence ought to have been rejected. It was unfair to the appellant to admit the evidence in all the circumstances, and especially where (a) the offence was a capital offence, (b) it was the only evidence implicating the appellant, and (c) it contained so many discrepancies.

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[3] (1928) 277 U.S. 438, 469.
[4] (1949) 338 U.S. 25, 28, 42.
[5] (1897) 25 Rettie C.S. 315.
[6] (1899) 1 Fraser (J.) 50.
[7] 1913 S.C.(J.) 68.
[8] 1933 S.C.(J.) 72.
[9] 1936 S.C.(J.) 16.
[10] 1949 S.C.(J.) 73, 87, 89.
[11] 1950 S.C.(J.) 19.
[12] 1950 S.C.(J.) 33, 36.
[13] 1951 S.C.(J.) 14.
[14] 1951 S.C.(J.) 96, 102.
[15] S.A.L.R. 1925 T.P.D. 491, 536.
[16] S.A.L.R. 1927 C.P.D. 181.

LORD GODDARD C.J. (after their Lordships had consulted). Their Lordships are clearly of opinion that the evidence in question was admissible, and do not therefore require any argument on that aspect of the case on behalf of the Crown. They would like to hear argument on the general aspect of the case as to whether the conviction should be allowed to stand on the general grounds. There are certain features in the case which do seem to call for comment; these are the differences of opinion among the witnesses and the fact that, though it is a capital case, witnesses of the search, who seem to be of great importance, were not called. Also the assessors attached great importance to the fact that a penknife said by the police to have been in the accused's possession had not been produced.

D. A. Grant for the Crown. There are now really only two matters with which the Board are concerned, the discrepancies in the evidence and the failure to call certain evidence. Any review of the facts at this particular stage is closed completely by the evidence of constable Ogwang, which the trial judge said that he expressly believed. If the judge really believed Ogwang it would not make any difference whether the other witnesses were called or not, for applying the Board's rules in criminal matters it is impossible to see how this appeal can be allowed on the facts unless the Board are prepared to go so far as to say that no judge could have believed the evidence for the prosecution in this case.

Dec. 8. LORD GODDARD C.J. Their Lordships are unable to advise Her Majesty to allow this appeal on the ground that evidence was wrongly admitted, and will give their reasons for that decision at a later date. On the facts, their Lordships feel that they are unable in accordance with the well-established practice of this Board to advise Her Majesty to allow the appeal, but they will make certain representations to the Secretary of State immediately and direct that the sentence shall not be carried out until he has had an opportunity of considering the case.

1955. Jan. 11. The reasons of their Lordships for dismissing the appeal were delivered by LORD GODDARD who, after stating the facts set out above, continued: It is only right to say that the two rounds of ammunition differed from those which the police officers then had as part of their equipment. The prisoner all along denied that he was carrying these rounds, and at the trial also denied that he had had a pocket knife on him. The police said they had returned the knife to him after he was in custody. No explanation was given of this remarkable action on their part, nor was the knife produced at the trial nor any reason given for its absence. It is also to be observed that three other persons, two police officers and one civilian, were said to have been present when the prisoner was searched, one of them indeed was said to have actually picked up the two rounds after they had fallen from the prisoner's shorts. Their Lordships think it was most unfortunate, considering the grave character of the offence charged, which carries a capital penalty, that these important witnesses were not called by the prosecution: it was not suggested that they were not available. The assessors were all in favour of an acquittal, but the magistrate overruled them and convicted the appellant.

The first matter to which their Lordships desire to call attention is that the offence was alleged to have been committed at Chania Bridge in Thika in the Central Province. Thika was declared to be a special area by the Special Areas (No. 13) Order, 1953. By regulation 22B, which amended the Emergency Regulations, it is provided that it is the duty of any person in a special area to stop and submit to search by an authorized officer, which means by regulation 22A a police officer. If, therefore, Chania Bridge was in Thika, as the indictment alleged, it would appear that the action of the policeman was regular as permitted by law. No point seems to have been taken on this matter at the Assize Court. In the Court of Appeal it was taken, but that court said that as no evidence had been given on the subject beyond the evidence of the constable who said he was on duty at Chania road block near Thika it had not been proved that the offence was committed in a special area, and that it was too late for the Crown to rely upon it. They referred to a case, *Saleh Mohamed v. Rex*,[1] as disapproving a dictum of the Supreme

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[1] No. 196 of 1951.

Court of Kenya that a magistrate was entitled to have judicial knowledge of the location of all the towns and villages in Kenya. A report of that case was not before the Board and their Lordships have no wish to criticize a decision which they have not read, but with all respect to the Court of Appeal it appears to them that this was perhaps an unduly narrow view to take. They think it may well be that when an indictment alleges that a particular offence was committed at a particular place and no challenge or issue is raised at the trial on that point the court may assume, or at least take judicial knowledge, that the place is situate where the indictment states it is or that the maxim omnia praesumuntur rite esse acta would apply. However, the Board will proceed to deal with the case on the footing that there was no power in any police officer under the rank of assistant inspector to search the appellant. As it was a direct result of the search that the ammunition was found on the prisoner it is submitted that the evidence was illegally obtained and therefore could not be given or that the court was bound to ignore it. The proposition must be put in this alternative manner because it appears that no objection was taken when the witnesses were giving their evidence, but a submission to this effect was made at the close of the case for the prosecution.

In their Lordships' opinion the test to be applied in considering whether evidence is admissible is whether it is relevant to the matters in issue. If it is, it is admissible and the court is not concerned with how the evidence was obtained. While this proposition may not have been stated in so many words in any English case there are decisions which support it, and in their Lordships' opinion it is plainly right in principle. In *Reg.* v. *Leatham*,[2] an information for penalties under the Corrupt Practices Act, objection was taken to the production of a letter written by the defendant because its existence only became known by answers he had given to the commissioners who held the inquiry under the Act, which provided that answers before that tribunal should not be admissible in evidence against him. The Court of Queen's Bench held that though his answers could not be used against the defendant, yet if a clue was thereby given to other evidence, in that case the letter, which would prove the case it was admissible. Crompton J. said[3]: "It "matters not how you get it; if you steal it even, it would be "admissible." *Lloyd* v. *Mostyn*[4] was an action on a bond.

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[2] (1861) 8 Cox C.C. 498.

[3] Ibid. 501.

[4] (1842) 10 M. & W. 478.

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The person in whose possession it was objected to produce it on the ground of privilege. The plaintiff's attorney, however, had got a copy of it and notice to produce the original being proved the court admitted the copy as secondary evidence. To the same effect was *Calcraft* v. *Guest.*[5] There can be no difference in principle for this purpose between a civil and a criminal case. No doubt in a criminal case the judge always has a discretion to disallow evidence if the strict rules of admissibility would operate unfairly against an accused. This was emphasized in the case before this Board of *Noor Mohamed* v. *The King*,[6] and in the recent case in the House of Lords, *Harris* v. *Director of Public Prosecutions.*[7] If, for instance, some admission of some piece of evidence, e.g., a document, had been obtained from a defendant by a trick, no doubt the judge might properly rule it out. It was this discretion that lay at the root of the ruling of Lord Guthrie in *H.M. Advocate* v. *Turnbull.*[8] The other cases from Scotland to which their Lordships' attention was drawn, *Rattray* v. *Rattray*,[9] *Lawrie* v. *Muir*[10] and *Fairley* v. *Fishmongers of London*,[11] all support the view that if the evidence is relevant it is admissible and the court is not concerned with how it is obtained. No doubt their Lordships in the Court of Justiciary appear at least to some extent to consider the question from the point of view whether the alleged illegality in the obtaining of the evidence could properly be excused, and it is true that Horridge J. in *Elias* v. *Passmore*[12] used that expression. It is to be observed, however, that what the judge was there concerned with was an action of trespass, and he held that the trespass was excused. In their Lordships' opinion, when it is a question of the admission of evidence strictly it is not whether the method by which it was obtained is tortious but excusable but whether what has been obtained is relevant to the issue being tried. Their Lordships are not now concerned with whether an action for assault would lie against the police officers and express no opinion on that point. Certain decisions of the Supreme Court of the United States of America were also cited in argument. Their Lordships do not think it necessary to examine them in detail. Suffice it to say that there appears to be considerable difference of opinion among the judges both in the State and

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[5] [1898] 1 Q.B. 759.

[6] [1949] A.C. 182, 191–2; 65 T.L.R. 134; [1949] 1 All E.R. 365.

[7] [1952] A.C. 694, 707; [1952] 1 T.L.R. 1075; [1952] 1 All E.R. 1044.

[8] 1951 S.C.(J.) 96.

[9] (1897) 25 Rettie 315.

[10] 1950 S.C.(J.) 19.

[11] 1951 S.C.(J.) 14.

[12] [1934] 2 K.B. 164; 50 T.L.R. 196.

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Federal courts as to whether or not the rejection of evidence obtained by illegal means depends on certain articles in the American Constitution. At any rate, in *Olmstead* v. *United States*,[13] the majority of the Supreme Court were clearly of opinion that the common law did not reject relevant evidence on that ground. It is right, however, that it should be stated that the rule with regard to the admission of confessions, whether it be regarded as an exception to the general rule or not, is a rule of law which their Lordships are not qualifying in any degree whatsoever. The rule is that a confession can only be admitted if it is voluntary, and therefore one obtained by threats or promises held out by a person in authority is not to be admitted. It is only necessary to refer to *Reg.* v. *Thompson*,[14] where the law was fully reviewed by the Court for Crown Cases Reserved.

As they announced at the conclusion of the arguments, their Lordships have no doubt that the evidence to which objection has been taken was properly admitted. The ground upon which leave to appeal was given therefore fails and they have humbly advised Her Majesty to dismiss the appeal. Their Lordships indicated when they announced their decision that there were matters of fact in the case which caused them some uneasiness though they did not consider they were of a nature which according to the settled practice of the Board would entitle them to tender other humble advice. But they thought it right to call them to the attention of the Secretary of State and accordingly they say no more about them.

Solicitors: *Gaster & Turner; Charles Russell & Co.*

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[13] (1928) 277 U.S. 438.

[14] [1893] 2 Q.B. 12; 9 T.L.R. 435.

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1954
Nov. 25.

1955
Jan. 11.

CHAN KAU ALIAS CHAN KAI . . . . APPELLANT;

AND

THE QUEEN . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF HONG KONG.

Hong Kong—Criminal Law—Murder—Self defence—Onus of proof on prosecution throughout—Issue of provocation expressly withdrawn from jury—Fit case for jury on provocation—Verdict of manslaughter substituted for murder.

Criminal Law.

In cases where the evidence discloses a possible defence of self defence the onus remains throughout upon the prosecution to establish that the accused is guilty of the crime of murder and the onus is never upon the accused to establish this defence any more than it is for him to establish provocation or any other defence apart from that of insanity. Since the decision of the House of Lords in *Woolmington* v. *Director of Public Prosecutions* [1935] A.C. 462; 51 T.L.R. 446 and *Mancini* v. *Director of Public Prosecutions* [1942] A.C. 1; 58 T.L.R. 25; [1941] 3 All E.R. 272 it is clear that the rule with regard to the onus of proof in cases of murder and manslaughter is of general application and permits of no exceptions save only in the case of insanity, which is not strictly a defence. It has been expressly so decided in the case of self defence in Scotland and in Canada: *H.M. Advocate* v. *Doherty*, 1954 S.L.T. 169, and *Latour* v. *The King* [1951] 1 D.L.R. 834.

The statement in the summing up in *Reg.* v. *Smith* (1837) 8 C. & P. 160, 162, that "before a person can avail himself of that "defence [self defence] he must satisfy the jury that the defence "was necessary," and which is quoted in Archbold's Criminal Pleading, Evidence and Practice, 33rd ed., p. 942, needs some modification in the light of modern decisions.

Where on the trial of the appellant on a charge of murder the trial judge, dealing with the defence of self defence, quoted the above-cited passage from *Reg.* v. *Smith* (supra) in his summing up and added "he, the accused, must satisfy you that the defence "was necessary," the jury were not adequately directed on that issue, which they in fact found against the appellant. On a fair consideration of the whole proceedings, however, it could not be held, applying the test in *Teper* v. *The Queen* [1952] A.C. 480, 492; [1952] 2 T.L.R. 162; [1952] 2 All E.R. 447, that there was a probability that that misdirection turned the scale against the appellant. The evidence did establish, however, that there was a case with regard to the defence of provocation fit to be left to the jury, and that issue having in fact been expressly withdrawn from them by the trial judge, the verdict of guilty of murder could not stand and

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* *Present*: LORD OAKSEY, LORD TUCKER and MR. L. M. D. DE SILVA.

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the case was remitted to the appellate court below with a direction to record a verdict of guilty of manslaughter and to pass sentence accordingly.

Judgment of the Supreme Court of Hong Kong (Appellate Jurisdiction) reversed.

APPEAL (No. 29 of 1954), by special leave in forma pauperis, from a judgment of the Supreme Court of Hong Kong in its appellate jurisdiction (Gregg and Reynolds JJ.) (March 5, 1954) dismissing an appeal from a verdict and judgment of the Supreme Court in its criminal jurisdiction (Reece J. and a mixed jury) (December 23, 1953) whereby the appellant was convicted of the murder of one Chan Fook on July 23, 1953, and was sentenced to death.

The following facts are taken from the judgment of the Judicial Committee: Among those employed at the Naval Dockyard at Stonecutters Island were two rival groups led respectively by two men called Mak Hei and Ho Kai, and prior to July 23, 1953, there had been trouble between members of these groups with the result that the Mak Hei group decided to attack the Ho Kai group as they left Ho Kai's house at the conclusion of a party which was taking place there that evening. Chan Fook was one of those attending the party and he was killed after leaving the house in the course of incidents arising out of the attack by Mak Hei's group. There was no dispute that his death was due to one or more violent blows with a weapon, sometimes described as a chopper and sometimes called a knife, wielded by the appellant.

The appellant was not normally a member of either of the two rival groups. He was employed by Mak Hei at a teahouse on Diamond Hill where Mak Hei carried on a business in addition to his employment at Stonecutters Island.

The case for the prosecution was that, although not a regular member of the Mak Hei group, the appellant on the evening in question joined with Mak Hei and other members of his group knowing that they intended to attack the Ho Kai group, and that thereafter he actively assisted them in their unlawful enterprise in the course of which he killed Chan Fook.

The case for the defence was that at no time was the appellant taking any part in the unlawful expedition or the attack. Certain creditors of Mak Hei who had been introduced by the appellant were pressing for payment of their accounts for goods supplied to the teahouse and causing trouble. Accordingly the appellant went to see Mak Hei on the evening of July 23, and told him

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that some of the creditors were threatening to remove the frigidaire from the teahouse if their accounts were not paid. Mak Hei tried to put him off by saying that he was busy and going to a fight. The appellant went with him, not in order to take part in the fight, but for the purpose of pressing Mak Hei to pay his creditors. When the fight began Chan Fook mistook the appellant for one of his assailants and attacked him. The appellant endeavoured to escape and picked up a knife from a nearby stall with which he struck Chan Fook in self defence or, alternatively, under such provocation as would reduce the crime to manslaughter.

1954. November 23, 24. *Dingle Foot Q.C.* and *Ingram Poole* for the appellant. On the evidence of the accused there were at least two defences open to him: (1) a defence of provocation, which, if established, would reduce the verdict from murder to manslaughter; and (2) a defence of self defence. The trial judge directed the jury in express terms that there was no room for a finding of provocation, and that therefore they could not bring in a verdict of manslaughter, but only of guilty or not guilty of murder. He directed them that it was the duty of the accused to satisfy them that he had in fact been provoked. It is submitted that the judge completely misconceived this branch of the law; his ruling is contrary to all the authorities on this subject. He then went on to say that on the evidence there was no warranty for the defence of self defence. Here, again, it looks as if the burden of establishing self defence lay on the accused. So at least two perfectly good defences were not left to the jury—provocation, which was expressly withdrawn, and self defence, which was in effect withdrawn from the jury.

Very similar considerations apply to the defences of provocation and self defence. Although not specifically dealt with in the same way as provocation, it does follow from the general principles laid down in *Woolmington* v. *Director of Public Prosecutions* [1] and *Mancini* v. *Director of Public Prosecutions* [2] that in self defence no less than in the defence of provocation the onus never shifts and is throughout on the Crown. The onus is always on the Crown except in cases of insanity and where expressly provided by statute. Though it follows from the authorities that the onus in cases of self defence always rests on the Crown, that appears not to have been specifically said in any English cases, but it has been so held in Scotland and in Canada: *H.M. Advocate* v. *Doherty*[3] and *Latour* v. *The King*.[4] The statement in the summing up in *Reg.* v. *Smith*[5] that "before a person can avail "himself of that defence [self defence], he must satisfy the jury "that that defence was necessary," which has been quoted in Archbold's Criminal Pleading, Evidence and Practice, 33rd ed., at p. 942, cannot be supported in the light of the authorities. [Reference was also made to *Holmes* v. *Director of Public Prosecutions*[6] and *Rex* v. *Hopper*.[7]]

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[1] [1935] A.C. 462; 51 T.L.R. 446.

[2] [1942] A.C. 1; 58 T.L.R. 25; [1941] 3 All E.R. 272.

There was material here on which, if the jury had been properly directed, they could have acquitted. If the Board are against the appellant on the self defence point, but in his favour on provocation, a question of the sentence would arise. It would have been open to the Court of Appeal below to quash the conviction of murder and substitute a verdict of manslaughter. There is also power in the court below to order a new trial, and this Board has the same power.

Ingram Poole followed and, on the question whether there had been a proper direction as to the burden of proof, referred to *Rex* v. *Prince*[8] and *Mancini's* case.[9] The view expressed in Foster's Crown Law (1762), at p. 255, was expressly disapproved in *Woolmington's* case.[10]

D. A. Grant for the Crown. With regard to provocation, the trial judge in his summing up said: "The evidence for the Crown "is that these people were attacked as they were walking along "the street without any provocation. . . . What evidence is "there of provocation? . . . I tell you there is no evidence what- "ever, . . . where the evidence does not warrant a finding of "manslaughter on the ground of provocation, it is the duty of a "judge to tell the jury to ignore the defence of provocation, and "I tell you that in this case there is no evidence to justify a "finding on your part of provocation in law and you are to ignore "it." The appellant was on the evidence taking an active part in the fulfilment of the design to fight at the time when he was assaulted, at least to the extent that he was to warn against the appearance of the police, and he cannot therefore as a matter of law avail himself of the defence of provocation because he had brought it on himself, and that was the justification for the removal of provocation from the jury. Even if that be wrong, the facts of this case were such that any reasonable jury properly directed could have found that the killing of the deceased by the appellant was unprovoked. The incident has to be looked at as a whole. Further, the action of the appellant in striking the blow with the knife was quite out of proportion to the assault by the deceased, who before the appellant seized the knife had only assaulted him with his fists.

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[3] 1954 S.L.T. 169.

[4] [1951] 1 D.L.R. 834.

[5] (1837) 8 C. & P. 160, 162.

[6] [1946] A.C. 588; 62 T.L.R. 466; [1946] 2 All E.R. 124.

[7] [1915] 2 K.B. 431; 31 T.L.R. 360.

[8] (1941) 28 Cr.App.R. 60, 62.

[9] [1942] A.C. 1.

[10] [1935] A.C. 462, 474.

With regard to self defence, in view of the summing up in the *Mancini* case [11] I do not desire to address the Board on the question of onus. If in his assault against the appellant the deceased was acting under provocation from persons who were in concert with the appellant, that does not justify the appellant having a defence of self defence: Stephen's Digest of the Criminal Law, 9th ed., p. 251. Further, on the facts a defence of self defence was not justified in this case.

Dingle Foot Q.C. in reply. It was the duty of the trial judge to direct the jury that the onus was on the Crown throughout and he did not do so, and thus clearly misdirected them. A misdirection as to the law should entitle the appellant to succeed. It would be an unusual and unprecedented course to order a new trial at this stage. In *Joseph* v. *The King* [12] the whole proceedings were held to be a nullity, so there would appear to be some ground for arguing that there should be a new trial, but the Board declined to order one. If the Board are not of opinion that the conviction should be quashed on the issue of self defence, they should quash the conviction on the issue of provocation and direct a verdict of manslaughter to be substituted. /

November 25. LORD OAKSEY. Their Lordships will humbly advise Her Majesty that the appeal ought to be allowed. The case will be remitted to the Court of Appeal with directions that the conviction for murder be quashed, that a verdict of manslaughter be substituted, and that sentence be pronounced by the Court of Appeal. Their Lordships will deliver their reasons later.

1955. January 11. LORD TUCKER, giving their Lordships' reasons for allowing the appeal, stated the facts and the cases for the prosecution and the defence as set out above, and continued: Such in outline was the defence sworn to by the appellant, but it will be necessary later to set out verbatim that part of his evidence which dealt with the events immediately leading up to the blow which he struck.

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[11] [1942] A.C. 1. (The shorthand note of the summing-up was put before the Board.)

[12] [1948] A.C. 215.

This evidence differed materially from a statement which the appellant had made to the police on July 28 which, even allowing for difficulties of language and translation, the jury might well have thought amounted to an admission by the appellant that he had knowingly joined in Mak Hei's party for the purpose of assisting in the attack. On a proper direction they might accordingly have altogether rejected the appellant's sworn testimony, but he was entitled to have his defence as given in evidence fairly put before the jury, and it was the judge's duty to direct the jury on the law applicable to the case on that basis.

The appellant now submits that the defence of provocation was wrongly withdrawn from the jury and that there was misdirection with regard to the defence of self defence.

Before dealing with these two separate aspects of the case their Lordships think it desirable to state—and this was agreed by counsel for the Crown—that in cases where the evidence discloses a possible defence of self defence the onus remains throughout upon the prosecution to establish that the accused is guilty of the crime of murder and the onus is never upon the accused to establish this defence any more than it is for him to establish provocation or any other defence apart from that of insanity. Since the decisions of the House of Lords in *Woolmington* v. *Director of Public Prosecutions* [1] and *Mancini* v. *Director of Public Prosecutions*,[2] it is clear that the rule with regard to the onus of proof in cases of murder and manslaughter is of general application and permits of no exceptions save only in the case of insanity, which is not strictly a defence. It has been expressly so decided in the case of self defence in Scotland and Canada, cf. *H.M. Advocate* v. *Doherty* [3] and *Latour* v. *The King*.[4] It is unfortunate that in Archbold's Criminal Pleading, Evidence and Practice, 33rd ed., at p. 942, a passage is quoted from the summing up in the case of *Reg.* v. *Smith* [5] where, dealing with self defence, these words occur: "Before a person "can avail himself of that defence, he must satisfy the jury "that that defence was necessary." This actual passage was quoted by the trial judge in the course of his summing up in the present case. It clearly needs some modification in the light of modern decisions.

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[1] [1935] A.C. 462; 51 T.L.R. 446.

[2] [1942] A.C. 1; 58 T.L.R. 25; [1941] 3 All E.R. 272.

[3] 1954 S.L.T. 169.

[4] [1951] 1 D.L.R. 834.

[5] (1837) 8 C. & P. 160, 162.

Turning now to the two matters relied upon on the present appeal. The issue of provocation was expressly withdrawn from the jury, who were ultimately directed—in reponse to a question from their foreman—that the only possible verdicts were guilty of murder or not guilty.

The appellant's defence as given in evidence at the trial has already been outlined. It is now necessary to set out the vital passages verbatim, since withdrawal of the issue of provocation from the jury must be judged on a view of the evidence most favourable to the accused. After describing the circumstances in which he came to be on the scene with Mak Hei and saying that Mak Hei had told him to go and tell a group of people not to start fighting as there was a policeman in sight, he said that before he got to them they had already started fighting and he saw three or four persons setting upon another. The questions and answers then proceed as follows:—

(*Q.*) Did you see anybody holding anything?

(*A.*) Yes I did.

(*Q.*) What did you see?

(*A.*) I could not tell what it was but I saw something wrapped in newspaper.

(*Q.*) Then what happened?

(*A.*) Then this man ran and the other people ran after him. This person ran and the other people ran after him.

(*Q.*) What do you mean by " this person "?

(*A.*) The person from the opposite party.

(*Q.*) Did you know him?

(*A.*) No.

(*Q.*) And what happened?

(*A.*) When this person was about near the Kong Wah Cafe, he turned around and fought with the group of pursuers. I then went up to these people and said, " Policeman, So Wing." The several people stopped setting upon this person. I wanted to go. This person came up and grabbed me with both of his hands. (In the manner as demonstrated by the witness in the box—gripped by the chest.) Then he held me with his left hand and hit me with his right hand (demonstrates).

(*Q.*) When he hit you, did you notice whether he was injured or not?

(*A.*) Yes, I think he was suffering from minor injuries.

REECE J.: You think?

(*A.*) No; he had a little quantity of blood on his person.

(*Q.*) What happened then?

(*A.*) He kept on beating me and I wanted to give him an explanation. I said, "You hit the wrong man. I have nothing "to do with it." At that time this man was really ferocious and so I had to resist. I had a chance and I freed myself from him. I started to run. He ran after me and hit my back. Well, I was acting on good intention to go up and tell the people not to set upon him but, when he hit me, I felt that I was very angry. I ran up to a stall which I have said to be a candy stall but which I now say is a bread stall and, at that moment, I was haywire. He was taller and bigger than I am and I had to resort to something in my resistance. I did not know that there was a knife in that place. As a matter of fact, I tried to get a pole or a bottle or things like that. I was given no chance for consideration and I picked up a knife blindly. This man squatted and was looking for something. I continued to run and he ran after me into the street. He hit my head at the back.

(*Q.*) With what did he hit you?

(*A.*) I don't know what it was but it was wooden.

(*Q.*) Did you see the object?

(*A.*) I did not.

(*Q.*) And then what happened?

(*A.*) I wanted to run but I was out of breath and, besides, I had flinching pains in both my loins. I was still beaten by him then, so I turned around (in a manner as demonstrated) and did this (demonstrates). I could not remember whether I struck once or twice. Then I ran along Sai Yeng Choi St.

On this evidence, and assuming his presence at the scene of action to have been innocent, their Lordships are of opinion that there was a case with regard to provocation fit to be left to the jury, whose function it was, having regard to all the circumstances of the case, to weigh in the scale the nature of the weapon used as against the degree of provocation received, and that accordingly the verdict of guilty of murder cannot stand.

With regard to self defence, although the judge gave correct and ample directions in general terms at the beginning and end of his summing up as to the onus of proof, when he came to deal with the defence of self defence he quoted the passage referred to above from *Reg.* v. *Smith*[5] and added the words "he the "accused must satisfy you that the defence was necessary," with the result that the jury were not in fact adequately directed on this issue. It is also true that when dealing with the evidence of the appellant he omitted to mention his having been struck by Chan Fook with a wooden implement and treated it as an attack with fists only. He also spoke of his having "gone back" after picking up the knife. The judge did, however, leave the issue of self defence to the jury, and their Lordships think he was wise to do so. By their verdict the jury rejected it.

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[5] (1837) 8 C. & P. 160, 162.

In his appeal to the Appellate Division the appellant made no complaint of the summing up with regard to self defence. The Appeal Court disposed of the matters relied upon in support of his appeal, of which the only one now remaining is that relating to provocation, in a judgment of six lines stating there was no substance in any of the grounds of appeal.

Viewing the case as a whole, their Lordships do not consider that the jury's rejection of the defence of self defence amounted to a miscarriage of justice. It is difficult, if not impossible, to infer from the evidence, taking the most favourable view for the defence, that the appellant's life was ever seriously endangered so as to justify—as distinct from excuse—the use of such a weapon.

Applying the test used in *Teper* v. *The Queen*[6] in the judgment of the Board delivered by Lord Normand, viz.: "The "test is whether on a fair consideration of the whole proceedings "the Board must hold that there is a probability that the "improper admission of hearsay evidence turned the scale "against the appellant" and substituting for the words "improper admission of hearsay evidence" the words "these "misdirections" their Lordships have no hesitation in answering the question posed in the negative.

In the result their Lordships have for the reasons stated above humbly advised Her Majesty that the appeal should be allowed and the verdict of guilty of murder set aside and the case remitted to the Appellate Division of the Supreme Court of Hong Kong with a direction to record a verdict of guilty of manslaughter and to pass sentence accordingly.

Solicitors: *Hy. S. L. Polak & Co.; Charles Russell & Co.*

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[6] [1952] A.C. 480, 492; [1952] 2 T.L.R. 162; [1952] 2 All E.R. 447.

ANTONIO ASSAF . . . . . . APPELLANT;

AND

DANIEL OLATUNJI FUWA AND OTHERS . RESPONDENTS.

J. C.*

1954
Oct. 4.

ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL.

West Africa—Vendor and purchaser—Priorities—Contracts to sell mortgaged land—Fee simple in mortgagees—Priority between purchasers—Equitable doctrine of conversion—Right to "call for" title deeds—Qui prior est tempore potior est jure. Vendor and Purchaser. Mortgage—Law before 1926.

On a conflict as to title between two owners of equitable interests in the same property situated in Lagos, Nigeria, one who had acquired his interest by a contract to purchase from a mortgagor and who had approved the title and executed the whole of his obligations under the contract, and one who had obtained a subsequent interest by a conveyance from the same mortgagor who had meanwhile become entitled to call for a reconveyance of the legal estate from the mortgagees:—

Held, that a mortgagee under Nigerian law being the owner of the legal estate in the realty mortgaged, in default of a reconveyance of the legal estate to the owner of the subsequent equitable interest or of a positive act by the mortgagees in his favour which would have taken the place of such a reconveyance, as for instance, an express declaration of trust in his favour, or a delivery of the title deeds to him, the operative principle in deciding which of the two had priority remained "qui prior est tempore potior est jure."

APPEAL (No. 3 of 1953) from a judgment of the West African Court of Appeal (Verity P. (C.J. of Nigeria), Lewey J.A. and de Comarmond J.) (May 26, 1951) allowing the defendant's appeal from a judgment of the Supreme Court of Nigeria (Ademola J.) (October 28, 1950) for recovery of possession of certain premises and mesne profits.

On October 9, 1948, Assaf, the plaintiff in the present action, contracted with one, Ajose, to purchase premises at 130, Denton Street, Ebute Metta, Lagos, Nigeria, of which Ajose was the mortgagor. The property had been mortgaged on July 5, 1948, and, according to the law of Nigeria, the mortgagees were thus the owners of the legal estate in the premises.

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* *Present*: LORD PORTER, LORD ASQUITH OF BISHOPSTONE and LORD KEITH OF AVONHOLM.

[Reported by MISS ELAINE JONES, Barrister-at-Law.]

By October 16, 1948, Assaf had accepted proof of Ajose's title and had paid the whole purchase price of £1,600, out of which Ajose was intended by the parties to discharge the mortgage, to one Cameron, of the firm of Irving & Bonnar, who were acting as solicitors for both Assaf and Ajose. By a letter dated October 25, 1948, written by one Coker, a solicitor acting for Ajose, to Messrs. Irving & Bonnar, Ajose purported to countermand the sale to Assaf and, on the same date, he purported to sell the same property to one Okunubi. Out of the purchase price of £2,700 paid by Okunubi, Ajose discharged the mortgage debt but the mortgagees did not reconvey the legal estate in the premises and it remained vested in them at the date of this appeal to the Judicial Committee. On October 29, 1948, Ajose purported to convey the fee simple in the premises to Okunubi.

Assaf commenced an action against Ajose for a decree of specific performance and mesne profits in the Supreme Court of Nigeria, and in a judgment of June 28, 1949, Gregg J. made the decree prayed for. In compliance with the judgment Ajose then executed a conveyance of the premises to Assaf. By a writ of March 11, 1950, Assaf began the present action against Okunubi for recovery of the premises and mesne profits. After this date Okunubi died and the action was continued against his personal representatives.

The facts appear fully from the judgment of the Judicial Committee.

1954. May 31; June 1, 2, 3. *John Pennycuick Q.C.*, *T. B. W. Ramsay* and *J. Woodhouse* for the appellant. According to the law of Nigeria the legal estate was at all relevant times in the mortgagees. Neither Assaf nor Okunubi ever had, therefore, more than an equitable interest, and it is submitted that according to the rule " qui prior est tempore potior est jure " the interest of Assaf, which was the first to be created, must prevail.

The contest between the parties may be expressed in the form of five issues: (1) Was there, on or before October 16, 1948, a valid contract for the sale of the premises for a sum of £1,600 between Assaf and Ajose? It is submitted that it is no longer open to the respondents to say that there was no contract. (2) Was this contract one of which specific performance would have been granted? The only possible ground for maintaining that a decree of specific performance of the contract could not have been obtained by Assaf must be the existence of the encumbrance. It is, however, no objection to the title of a vendor that his estate is subject to an interest of which it lies within his power to dispose without the concurrence of any other party. The only ground on which an encumbrance could be an objection to specific performance would be when it creates an impossibility of performance because the vendor is unable to create a good title: *Potter* v. *Sanders.*[1] (3) Did the contract create an equitable interest in the property in favour of Assaf? The equitable doctrine of conversion is applicable where a contract is capable of specific performance but not otherwise. This doctrine is founded upon the maxim "equity looks on "that as done which ought to be done" and is applied between vendor and purchaser by treating the vendor as trustee of the property from the date of the contract until the date of the conveyance and the purchaser as owner subject to the vendor's lien: Snell's Principles of Equity (23rd ed., pp. 200 and 205); William's Vendor and Purchaser (4th ed., pp. 545 and 547); *Holroyd* v. *Marshall*[2] and *Shaw* v. *Foster.*[3] From the making of the contract Ajose became trustee for Assaf of the property of which Ajose was already the equitable owner. (4) Did the equitable interest of Assaf, being earlier in date than that of Okunubi, prevail over that interest? The answer, according to the rule qui prior est tempore potior est jure, must be in the affirmative unless the interest of Assaf was, in some way, displaced. (5) Did Okunubi reverse the priority of the interests of himself and Assaf by some subsequent operation? It is true that according to the maxim "where equities are equal the law shall "prevail" the interest of the holder of a later equitable interest, who acquires a legal estate for value without notice of an earlier equitable interest, either by a conveyance to himself or to a third party as trustee on his behalf, takes priority over the earlier equitable interest. The party who takes the legal estate as trustee for the holder of the later equitable interest must not, however, for this purpose have notice of the earlier equitable interest, for such party cannot place the holder of the later equitable interest in the position of the holder of the legal estate to the detriment of the holder of an earlier equitable interest of which he has notice. As a trustee, he holds subject to a duty to give effect to equitable interests in due course of priority.

The mortgagee in the present case was a trustee with notice of Assaf's interest and was completely debarred from constituting

[1] (1846) 6 Hare 1.
[2] (1861) 10 H.L.C. 191.
[3] (1872) L.R. 5 H.L. 321.

himself a holder for Okunubi to the detriment of Assaf. Nor is there any evidence that the mortgagee in fact ever purported to make a declaration of trust in favour of Okunubi and, no doubt, he omitted to do so for the good reason that he had notice of Assaf's interest. The finding of the West African Court of Appeal that, after the conveyance to Okunubi, the mortgagee became a bare trustee for him arises from the fallacy of disregarding the prior equitable interest of Assaf. The position of a mortgagee in equity has always been that he holds the land only as a security and that the mortgagor is the owner subject to the mortgagee's charge: *In re Wells.*[4] By the contract of October 9, 1948, Assaf became the owner of the land subject to the charge of the mortgagee, who was a trustee successively for Ajose and Assaf. When Ajose purported to sell to Okunubi he had, in fact, nothing left to sell. When Ajose discharged the debt the mortgagee continued to be trustee for Assaf. The only difference was that he was then a bare trustee instead of a trustee with a right. The sale to Okunubi was ineffective in equity as in law and Okunubi never got the shield of a legal estate.

Lionel Edwards Q.C. and *R. A. Williams* for the respondents. The effect of the repayment of the mortgage debt was to impose upon the mortgagee an obligation to reconvey to Ajose, who had a right to demand a reconveyance in law (less than six months having elapsed since the creation of the mortgage) as well as in equity; neither Assaf nor Okunubi had any such right. Ajose, by the conveyance to Okunubi of October 29, 1948, conveyed to him, by virtue of the Conveyancing Act, 1881, s. 63 (1), all "liberties, "privileges . . . rights and advantages whatsoever, appertaining " . . . to the land." Okunubi, therefore, acquired the right in law and in equity to call for a reconveyance. Assaf had no such right because, although any person interested in the equity of redemption is entitled to redeem, yet one who has merely contracted to buy has no right to redeem. Though a mortgagee have notice of a contract to sell the land, his only duty is to reconvey to the mortgagor. Equitable conversion applies only as between the parties to a contract and does not affect the mortgagee with notice of the contract: *Tasker* v. *Small*[5] and *Pearce* v. *Morris.*[6] Only when the equitable title of a contracting party is completed by transfer does he become entitled to a reconveyance by a paid-off mortgagee of the legal estate. Where there are two conveyances the first in time has priority for he has the prior right to command the legal estate. Okunubi, therefore, had the better right to call for the legal estate.

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[4] [1933] Ch. 29.

[5] (1837) 3 My. & Cr. 63.

[6] (1869) L.R. 5 Ch. 227.

Okunubi was a bona fide purchaser for value without notice, and such a purchaser is entitled to the benefit of the legal title, not merely where he has obtained it but also where he has the better right to call for it: *Taylor* v. *London and County Banking Co.*[7]; *Wilkes* v. *Bodington*[8]; *Maundrell* v. *Maundrell*[9]; *Rooper* v. *Harrison.*[10] Okunubi had the better and, indeed, the only right to call for the legal estate from the mortgagees, and his claim should prevail because he was, therefore, entitled to the benefit of the legal estate.

Assaf became in equity the owner of the land subject to the mortgage, but this affected only the two contracting parties and did not impose any obligation on the mortgagee. This submission may be tested by considering the nature of Assaf's equity. It was prior in time to the equity of Okunubi, but it was an interest commensurate only with the relief which equity would give by way of specific performance and existed if and in so far as equity would give relief: *Howard* v. *Millar.*[11] If the conveyance to Okunubi were proved in an action by Assaf for specific performance the court would hold that his only remedy was in damages. The maxim qui prior est tempore potior est jure does not apply between holders of equitable titles where one of them has the right to call for the legal estate. The argument put forward on behalf of the appellant contains two flaws; the first is that just referred to; the second is the contention that the mortgagee was trustee successively for Ajose and Assaf. The position of a mortgagee who has been paid off is in many ways that of a trustee, but it is dangerous to argue from analogy. He is a trustee for the mortgagor who has repaid but not for a person claiming to have contracted to purchase from the mortgagor.

Pennycuick Q.C. in reply. It is now common ground that unless some supervening event occurred to change the situation there was a contract between Ajose and Assaf of which specific performance would have been granted. The whole argument on behalf of the respondents is that Okunubi is in as good a position as if he had the legal estate. Two lines of authority are relied upon—the *Tasker* v. *Small*[12] line and the *Taylor* v. *London and*

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[7] [1901] 2 Ch. 231; 17 T.L.R. 413.

[8] (1707) 2 Vern. 599.

[9] (1804) 10 Ves. 246.

[10] (1855) 2 K. & J. 86.

[11] [1915] A.C. 318.

[12] 3 My. & Cr. 63.

County Bank[13] line—but these two lines lead to rather different conclusions. The first line leads to the conclusion that Okunubi has a prior equity as against Assaf by reason that the legal estate is in the hands of a mortgagee whose mortgage has been paid off. The second line leads to the conclusion that, even though Okunubi has an inferior equity, he is in the same position as if he had the legal estate because it was at his command. As regards the *Tasker* v. *Small*[14] line, this is inapplicable to justify the proposition that the mortgagee was a trustee only for Ajose and his assignee Okunubi and was never, in any sense, a trustee for Assaf. For although the contract between Ajose and Assaf had not been completed by conveyance, Assaf had paid the whole purchase price. This rendered Ajose a bare trustee for Assaf not entitled to the vendor's lien. The dictum in *Tasker* v. *Small*[15] was considerably qualified by *Pearce* v. *Morris*,[16] where it was said that it was not certain whether a mortgagee was entitled to refuse payment from the purchaser under a contract because the contract might go off. In the present case there was no question of the contract going off, and on repayment the mortgagee was bound to reconvey to the purchaser under it. It is putting the point far too high to say that a mortgagee is never bound to have regard to the interest arising from an uncompleted contract: *Tarn* v. *Turner*,[17] in which *Pearce* v. *Morris*[18] was considered and explained.

Where there is no dispute as to the contract the purchaser can clearly redeem, and the mortgagee is then his constructive trustee. If there is a dispute as to the contract, the result is not that the mortgagee may disregard the purchaser, but that he may withhold the deeds until the dispute has been cleared up. He would reconvey at his peril. The delay so caused is no hardship to the mortgagee and is an everyday occurrence. If the mortgagee, having been redeemed, were a trustee for Okunubi, it would mean that the mortgagee would have to have regard to different persons and priorities from those binding the mortgagor. In truth, upon redemption the mortgagee holds on a constructive trust for the persons interested under the mortgagor in the same order of priority as those persons would have as against the mortgagor himself: *Cholmondeley* (*Earl*) v. *Clinton* (*Lord*).[19] As regards the *Taylor* v. *London and County Bank* [20] line, there must be an express declaration of trust by the mortgagee or something tantamount to that, such as the joining by the mortgagee as a party in the assignment of the equitable interest to the purchaser: *Stanhope* v. *Verney (Earl)* [21]; *Wilkes* v. *Bodington* [22]; *Maundrell* v. *Maundrell.*[23] Where the owner of the legal estate remains passive, the holder of the equitable interest cannot claim to have the legal estate at his command.

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[13] [1901] 2 Ch. 231; 17 T.L.R. 413.

[14] 3 My. & Cr. 63.

[15] Ibid.

[16] L.R. 5 Ch. 227, 231.

[17] (1885) 39 Ch.D. 456, 465.

[18] L.R. 5 Ch. 227.

[19] (1815) 19 Ves. 261.

It was said for the respondents that Ajose had, under the Conveyancing Act, 1881, passed to Okunubi the right to demand a reconveyance. It is submitted that before that stage Ajose had already parted with every interest that he had in the land to Assaf.

October 4. The judgment of their Lordships was delivered by LORD PORTER. In 1948 one Ajose owned certain premises called 130, Denton Street, Ebute Metta, Lagos, Nigeria. On July 5, 1948, Ajose mortgaged these premises by an instrument of that date for £1,000 to a limited company of registered moneylenders, Messrs. Oshodi and Apena. A gentleman called Latunde Johnson, since deceased, was at this and at all material times a director of that company, and also employed as its solicitor. He attended to this particular matter.

On October 9, 1948, Ajose contracted to sell this mortgaged property to the plaintiff, the appellant in the present action, at a price of £1,600. This contract was made on the date mentioned and acknowledged on the same day at the offices of Messrs. Irving & Bonnar, solicitors, before one Cameron, a representative of that firm, who from then on acted, in relation to this transaction, as solicitor for both parties. On this occasion both parties instructed Cameron to obtain from the mortgagees the title deeds. Cameron did so, was satisfied as to title, and drafted (a) a reconveyance from the mortgagees; (b) a conveyance to Assaf, neither of which, however, were in the event executed.

The intention was that the plaintiff should acquire this property free from incumbrances, and in order to achieve this result that £1,300 out of the total price of £1,600 should be applied to the discharge of the mortgage debt and mortgage interest. Accordingly, the plaintiff paid Cameron, as agent for Ajose, two cheques, the first for £300, the second for £1,300 (dated October 9, 1948, and October 15, 1948, respectively). It is common ground now,

[20] [1901] 2 Ch. 231.

[21] (1761) 2 Eden 81.

[22] 2 Vern. 599.

[23] 10 Ves. 246.

though it was contested at some stages (1) that this contract of October 9, 1948, was a valid contract; (2) that it was evidenced by a note or memorandum sufficient to satisfy the requirements of the Statute of Frauds. It is here, perhaps, convenient to add that the law of Nigeria, so far as relevant to this case, consists of the rules of common law and equity, and statutes of general application ruling in England in 1900. Hence in Nigeria today a mortgagee is still, as under the law of England before 1926, the owner of the legal estate in the realty mortgaged, and the mortgagor has a mere equity of redemption. The mortgagor is not, as in England since the 1925 legislation, the owner, subject to a charge.

By October 16, 1948, the plaintiff—the intending buyer—had accepted proof of Ajose the seller's title, and had paid the whole of the purchase price, which Cameron had credited in his books to Ajose. It follows, in their Lordships' opinion, that at this stage, by the equitable doctrine of conversion, the plaintiff had become owner of the premises in equity, that as between Ajose and himself, Ajose was a trustee and that the plaintiff's equitable title related back to the date of the contract—October 9, 1948.

Meanwhile, although the whole of the purchase price due from the plaintiff had been paid to Cameron as Ajose's agent by October 16, 1948, neither Cameron nor Ajose had applied the appropriate or any portion of it to the redemption of the mortgage so as to secure, by repayment of the mortgage debt and interest, the execution of a reconveyance of the legal estate in favour of whoever might be entitled to such reconveyance. This might have been the plaintiff, who was the owner in equity of Ajose's interest, or Ajose as trustee for the plaintiff. At October 16, 1948, no one else was in the picture, and the position in law was then clear. The only beneficial title was in the plaintiff, who would have been wise, at the earliest moment, to get in the legal estate from the mortgagees. The position, however, became obscure owing to the group of events which next followed, and to which their Lordships proceed to refer.

Ajose does not seem to have been, in commercial matters, a man of supersensitive scruple. He now proceeded to sell over again, to one Okunubi, the property which he had already sold and been paid for by the plaintiff, and this gentleman (Okunubi), who was the original defendant in the present proceedings, has since died after action brought, and has been succeeded by his legal personal representatives.

The correspondence relating to the two transactions, though slender, is important, and should be set out in full.

It seems to have opened with a letter from Messrs. Irving & Bonnar on behalf of the plaintiff (or of the plaintiff and Ajose) of October 11, 1948, relating to the sale to the plaintiff. This letter has not survived, but the reply, dated October 12, 1948, was in the following terms: " Messrs. Irving & Bonnar, Solicitors, Lagos. " Dear Sirs, *Re* Sarminu Ajose's Mortgage Accounts. Yours of " October 11, 1948, came to hand and duly noted. Mr. Sarminu " Ajose has two mortgages with Messrs. The Oshodi & Apena Ld., " one at No. 130, Denton Street, Ebute Metta, and the other at " Igbobi Village, Yaba, both mortgages are at the Lands Registry, " Lagos, for registration which has not yet completed. The " certified true copies of conveyances in respect of these properties " are herewith enclosed. The mortgage debts on the two pro- " perties are as follows:—

" Re 130, Denton Street, Ebute Metta ..	£1,000	0	0
" Interest at 2½d. on £1 p.m. from " 29.9.48–29.10.48	10	8	4
" Re Igbobi Village, Yaba	300	0	0
" Interest at 3d. on £1 p.m. from " 29.9.48–29.10.48	3	15	0
Total ..	£1,314	3	4

" I shall be glad to receive your cheque for the above sums at " your earliest convenience. Yours faithfully, (Sgd.) A. L. " JOHNSON, Solicitor for Oshodi & Apena Ld."

There next followed two letters between one G. B. A. Coker and Messrs. Irving & Bonnar bearing on the sale to Okunubi, both dated October 25, 1948.

" Messrs. Irving & Bonnar, Solicitors, etc., Lagos. Dear Sir, " *Re* Sarminu Ajose: Property at No. 130, Denton Street, E.B. " I have been instructed by Mr. Sarminu Ajose to countermand " the instructions already given with regard to the sale of the " above-named property. Mr. Ajose informs me that the contract " of sale in respect of the property has not been completed by " you with anyone at all and as he has now got another more " reasonable offer than that proposed by you, I think you would " agree that he should stick to the higher offer the more so as " the property is at present under a mortgage. In the circum- " stances, I shall be much obliged if you would be good enough

" to stay any further steps with regard to the sale of the property " until further instructions: The mortgagee—Mr. Latunde Johnson has also been informed of this. With many thanks, Yours " faithfully, (Sgd.) G. B. A. COKER."

" G. B. A. Coker Esq., Solicitor, 13, Idumagbo Avenue, " Lagos. Dear Sir, Mr. Sarminu Ajose. 130, Denton Street, " Ebute Metta. We are in receipt of your letter of today's " date with regard to the above. We were also acting for the " purchaser Mr. A. E. Assaf and we presume his agreement to " the cancellation of the sale to him has been obtained. We " hold the purchase price paid by Mr. Assaf to Mr. Ajose's credit " in our client's account. Yours faithfully, IRVING & BONNAR."

No reply was ever received to the inquiry in the second paragraph of this letter.

Lastly, there came a letter dated October 26, 1948, from A. L. Johnson to Messrs. Irving & Bonnar.

" Messrs. Irving & Bonnar, Broad Street, Lagos. *Re* Sarminu " Ajose. Mortgage of 130, Denton Street, E.B. I have to inform " you that Sarminu Ajose has paid off the whole mortgage debt " with interests thereon since October 25, 1948. Will you kindly " return the certified true copies of the conveyances I sent you " on the 12th of this month as to enable me to return same to " him. Yours faithfully, (Sgd.) A. L. JOHNSON."

The events to which these letters furnish land marks were these:—

(a) Ajose, after contracting to sell the property to the plaintiff, later, through a solicitor called Coker (who only crosses the stage on this one occasion), tells the plaintiff that he, Ajose, has received a " more reasonable " offer for the property (viz.: Okunubi's offer) and means to embrace it. Coker says that Latunde Johnson, the representative of the mortgagees, has been informed of " this." How much or how little " this " includes has been in controversy, but their Lordships will assume it to cover all the information contained in Coker's letter. In later proceedings Ajose has contended that his contract with the plaintiff was " subject " to his obtaining a better offer, but this contention—not on the face of it plausible—has been rejected by every tribunal before whom it has been preferred, and is not now pursued.

(b) Ajose purported to sell the same property to Okunubi on October 25, 1948, and on that date Okunubi paid £2,700 for the property, the purchase price of the freehold. Out of this sum Ajose applied the appropriate amount (£1,500) to the repayment of the mortgage debt and this payment (though out of funds furnished by Okunubi and perhaps paid direct by him) was in law a payment by Ajose.

(c) Neither then, nor at any subsequent time, did the mortgagees reconvey the legal estate to anyone—Ajose, the plaintiff, or Okunubi. To this day it remains vested in the mortgagees; whether subject to any, and if so what, trust, is one of the issues in the appeal.

(d) On October 29, 1948, Ajose purported, by a "conveyance" of that date, to transfer to Okunubi the fee simple of the property. The "fee simple" in the circumstances of this case could not exceed the right—the utmost right Ajose retained—to require the mortgagees to reconvey the legal estate in the premises to himself. More he did not possess.

Their Lordships may at this point anticipate, in outline, the main issue which this case raises. The plaintiff contends that the legal result of the facts just recited, which in substance are not in dispute, was that (1) the ownership in equity of the premises was vested in the plaintiff, by virtue of the contract of October 9, 1948, and the doctrine of "conversion," and (2) that the legal estate never vested in Okunubi. It is not questioned that Okunubi gave value for whatever he got, and got it without notice of the plaintiff's interest, but neither is it questioned that he never obtained the legal estate. (3) Consequently the utmost interest that could vest in Okunubi was an equitable interest and (4) equitable interests in land take effect in the temporal order in which they are created. Hence the plaintiff, being indubitably, prior tempore, claims to be potior jure.

For the defendant, Okunubi, on the other hand, and later for his personal representatives, it was contended that, on the discharge of the mortgage debt by Ajose, (a) the mortgagees were not bound by any duty other than a duty owed to their mortgagor, Ajose—therefore in particular they were not concerned with and owed no obligations to persons standing behind Ajose or claiming under him by virtue of a contract to buy the mortgaged premises from him; (b) that their only duty was to reconvey the legal estate to him; (c) that by the conveyance of October 29, 1948, Ajose transferred or conveyed (the term does not matter) this right to Okunubi, who thereupon became entitled to call for a reconveyance; (d) that, upon the relevant authorities, the right to call for a reconveyance from a mortgagee of a legal estate vested in him by the mortgagor is as effective (granted (i) value and (ii) the absence of notice) as the reconveyance itself of that estate as an accomplished fact. Hence, it was argued, Okunubi, who certainly gave value and had no notice of the plaintiff's interest, was the equivalent of a purchaser for value without notice of the legal estate, and his title prevailed.

It is not suggested that this summary of the contentions on the two sides is exhaustive. Without expanding it at this stage their Lordships will conclude the narrative.

Okunubi, after the mortgage debt had been discharged, largely by money he had supplied, having no notice at that time of the plaintiff's interest, entered into possession of the premises and remained so possessed till he died, after the present action had been initiated and his personal representatives succeeded him as defendants.

The plaintiff brought an action against Ajose in 1949, for a decree of specific performance and mesne profits. The action was tried by Gregg J., who on June 28, 1949, made the decree prayed for. Ajose, in compliance therewith, executed a conveyance of the premises to the plaintiff. Okunubi gave evidence in these proceedings, but was not a party to them. Hence it is not surprising that every tribunal which was confronted with the contention that he was bound by the result of such proceedings, should have rejected it.

By a writ of March 11, 1950, the plaintiff started the present action against Okunubi, which since his decease has been continued against his personal representatives. The action was for recovery of the premises in question, and mesne profits. The statement of claim has been criticized, but in their Lordships' view alleges sufficiently the contract of sale by Ajose to the plaintiff: and recites the facts of the previous litigation before Gregg J. By his defence Okunubi averred that he had bought the property in dispute in October, 1948, bona fide, without notice of any interest in the property claimed by the plaintiff, and that Ajose conveyed to him, Okunubi, by the conveyance dated October 29, 1948 (" 1950 " is, it would seem, a misprint) all the rights and interests which Ajose had left in such property. The action came on for hearing before Ademola J. in the Supreme Court of Nigeria and judgment was given by that learned judge on October 28, 1950, in favour of the plaintiff for recovery of possession of the premises and £400 mesne profits. Ademola J. seems to have based his view, in part, on the reasoning that after Ajose had paid off the mortgage (an event which he dates October 25, 1948) Ajose had nothing left which he could convey to Okunubi. The plaintiff was already owner in equity and from

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that moment the legal estate also vested in him. But earlier in his judgment he uses language which suggests that Okunubi did obtain the legal estate, though as he had had notice of the plaintiff's rights through Latunde Johnson as his solicitor, those rights remained intact.

The case on appeal came before the West African Court of Appeal which gave judgment on May 26, 1951, Verity C.J.'s judgment being concurred in without individual reasons by the two other members of the court. The Chief Justice, after dealing with a number of issues which are no longer contested, held in effect (1) that the plaintiff had, at no stage, any estate in the land. He had merely a contract, and unless and until Ajose paid off the mortgage and obtained a reconveyance, and so made that contract capable of performance, the plaintiff could have no proprietary interests. If, as in fact happened, Ajose failed to obtain a reconveyance, all he, the plaintiff, could do was to sue Ajose for damages for breach of contract, which he had not done. (2) The Chief Justice does, however, also advert to the principle stated in these words in Snell's Principles of Equity[1]: "A purchaser for valuable consideration who obtains "a legal estate without notice of a prior equitable right is entitled "to priority in equity as well as in law."

On this point he held (a) that Okunubi had no notice of the prior equitable interest, notice to Latunde Johnson being in his view not notice to Okunubi but merely notice to the mortgagees, for whom he was acting; (b) that Okunubi had at the material time acquired the legal estate or its equivalent as a consequence of the discharge of the mortgage debt. The reasoning of the Chief Justice would seem to be that, after that discharge, the mortgagees held the legal estate as trustee for the mortgagor, Ajose; and that after the conveyance executed by Ajose in the defendant's favour on October 29, 1948, the legal interest remained vested in the mortgagees but was so vested "on behalf "of the defendant." On these grounds the appeal was allowed. The plaintiff appeals from this decision of the Court of Appeal for Western Africa to this Board.

Before this Board, counsel for the plaintiff raised five questions (a sixth, relating to registration of titles to land, no longer arises). (1) Was there in the first fortnight of October, 1948, between Ajose and Assaf, the plaintiff, a valid contract for the sale of those premises for £1,600? (2) If yes, was the contract one of which specific performance would have been granted? (3) If so, did such contract create an equitable interest or ownership in equity in the property in favour of Assaf? (4) If it did, did the equitable interest of Assaf, being earlier in time than any interest acquired by Okunubi, prevail over *his* interest, or (5) did Okunubi obtain priority over Assaf as a purchaser for value, without notice of Assaf's interest, of the legal estate? Counsel for the plaintiff claimed that the first four questions should be answered in the affirmative, citing *Holroyd* v. *Marshall*,[2] *Shaw* v. *Foster*,[3] and *Potter* v. *Sanders*,[4] amongst other authorities, and claimed that the fifth question should be answered in the negative. The fifth question raises the real contest between the parties.

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[1] 23rd ed., p. 31.

It is undisputed that neither the plaintiff nor the defendants ever acquired the legal estate: but it is argued for the defendants that priority as between them and the plaintiff depended not on which of them had the legal estate, but on which of them had the better right to "call for" it. Counsel for the defendants relied on the contention that, once the mortgage debt had been repaid by Ajose, and Ajose had executed the "conveyance" of October 29, 1948, in favour of Okunubi, Okunubi acquired the right, or at any rate a better right than the plaintiff possessed, to require a reconveyance of the legal estate from the mortgagees, and should be treated for the purpose of the rule as though that right had been successfully exerted. On this view the existence and effect of the instrument of October 29, 1948, are decisive. This instrument, so the argument runs, conveyed to Okunubi the rights of a mortgagor who has redeemed the mortgage, rights not possessed by one who has a mere contract to purchase from the mortgagor uncompleted by any conveyance. These rights, it is said, consisted of or included the right to call upon the mortgagee to convey to him the legal estate, or to hold it in trust for him. Such is the main argument for the respondents.

In support of his contention as to the infirmity of the rights of a person who has merely contracted to buy from the mortgagor, counsel relied on *Tasker* v. *Small*[5] and *Pearce* v. *Morris*.[6] Their Lordships would, however, remark (i) that the reasoning in this and other cases relied on, so far as it depreciates the rights of the intending purchaser on the mere ground that a mortgagee cannot safely convey to him because he may resile from his contract, is hardly applicable to a case where the intending purchaser has approved the title, paid the whole contract price to the solicitor for both parties who on his part has credited it to the seller's account in his books, and has executed the whole of his side of the contract; (ii) that in such circumstances the contract could not " go off " through his action; and (iii) that the second of these cases might well have been decided differently if, as in the present case, the contractor to buy from the mortgagor had approved the title before filing his bill.

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[2] (1862) 10 H.L.C. 191.

[3] (1872) L.R. 5 H.L. 321.

[4] (1846) 6 Hare 1.

[5] (1837) 3 My. & Cr. 63.

[6] (1869) L.R. 5 Ch. 227.

In support of the contention that a " better right " to call for a transfer of the legal estate is equiparated with actual possession of that estate, the defendants relied, inter alia, on *Wilkes* v. *Bodington*,[7] *Stanhope* v. *Verney (Earl)*,[8] *Maundrell* v. *Maundrell*,[9] and *Taylor* v. *London and County Banking Co.*[10] When these cases are closely examined it will be found that in every one of them there was, in addition to the mortgagor's act in redeeming or its equivalent, some positive act by the mortgagee operating in favour of the claimant; and counsel for the plaintiff contended that such an act there had to be, in order to defeat the strict temporal order in which, prima facie, equitable interests in land take priority. Okunubi, he argued, to be treated as though he had acquired the legal title, must be able to point to some such act; mere inertia or passivity on the part of the mortgagees will not avail him. He must show that the mortgagees either (1) had declared an express trust in his favour, or (2) had joined in the assignment or conveyance to him of October 29, 1948, or (3) had lodged the title deeds with him. *Taylor* v. *London and County Banking Co.*,[11] in their Lordships' view, supports this argument more particularly in the following passage from the judgment of Stirling L.J.[12]: " Now, a purchaser for value without notice is " entitled to the benefit of a legal title, not merely where he has " actually got it in, but where he has a better title or right to call " for it. This rule is laid down in *Wilkes* v. *Bodington*.[13] It has " accordingly been held that if a purchaser for value takes an " equitable title only, or omits to get in an outstanding legal " estate, and a subsequent purchaser for value without notice " procures, at the time of his purchase, the person in whom the " legal title is vested to declare himself a trustee for him, or even " to join as party in a conveyance of the equitable interest

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[7] (1707) 2 Vern. 599.
[8] (1761) 2 Eden 81.
[9] (1804) 10 Ves. 246.
[10] [1901] 2 Ch. 231; 17 T.L.R. 413.
[11] [1901] 2 Ch. 231.
[12] Ibid. 262, 263.
[13] 2 Vern. 599.

"(although he may not formally convey or declare a trust of the "legal estate), still the subsequent purchaser gains priority."

In the present case there was no transfer of the legal estate to Okunubi; no positive act by the mortgagees which could take its place; no declaration of trust in his favour; no joinder in the conveyance of October 29, 1948, nor delivery to Okunubi of the title deeds. There was therefore, it appears to their Lordships, nothing to displace the operation of the principle "qui prior est "tempore potior est jure." In this case there is no doubt who is "prior tempore." The plaintiff had made his contract, paid the price in full, and accepted the title before Okunubi made his first appearance. In these circumstances their Lordships consider that the plaintiff's title must prevail, and for the reasons given above will humbly advise Her Majesty that the appeal should be allowed. The defendants must pay the plaintiff's costs of the appeal to this Board and of the appeal to the West African Court of Appeal.

Appeal allowed.

Solicitors: *Lewis & Lewis and Gisborne & Co.; Hatchett Jones & Co.*

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FIRM OF A.M.K.M.K. . . . . . . APPELLANTS;

AND

M. R. M. PERIYANAN CHETTIAR . . . RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL OF THE FEDERATION OF MALAYA.

Malaya—Pre-occupation debt—Repayment—Current account between moneylenders—Pre-occupation debit—Whether discharged by payments made during occupation period—Rule in Clayton's case—Debtor and Creditor (Occupation Period) Ordinance, No. 42 *of* 1948 *(Federation of Malaya), ss.* 4, 8*—Construction.*
Debt—Discharge—Clayton's case, rule in.

By section 8 of the Debtor and Creditor (Occupation Period) Ordinance, 1948, of the Federation of Malaya: "For the purposes "of this Ordinance—(*a*) any payment made by, or on behalf of,

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* *Present*: LORD OAKSEY, LORD MORTON OF HENRYTON and LORD KEITH OF AVONHOLM.

"any person into any bank or other account during the occupation "period shall be deemed to have been applied first to any debit "balance, or part thereof, which arose during the occupation period "and was still outstanding against such person in such account at "the time when such payment was made; . . ."

The appellants and the respondent, both of whom were money-lenders carrying on business in Penang, had dealings between each other on current account as from February, 1939. On February 15, 1942, the beginning of the period of occupation by Japanese forces, $49,900 was owing on the account by the respondent to the appellants. They continued to operate the account during the occupation period (which ended on September 5, 1945), and it was in effect closed on or about August 6, 1945, there being then no balance due from the respondent to the appellants. The appellants claimed that, having regard to the provisions of section 8 of the Debtor and Creditor (Occupation Period) Ordinance, 1948, none of the payments made during the occupation period could be applied in or towards discharge of a pre-occupation debt, and that they were entitled to be paid by the respondent the pre-occupation debit balance of $49,900, with interest. The respondent pleaded that that sum was paid off by reason of the appellants' drawings by January 4, 1943, on which date the amount standing to the credit of the appellants was nil. It was not disputed that the common law of England was applicable to the case except in so far as it was expressly varied by the terms of the Ordinance of 1948:—

Held, that by section 8 of the Ordinance a payment made during the occupation period was to be deemed to have been applied *first* to any debit balance which arose during the occupation period, and the word "first" implied that there was some other purpose to which a payment made during the occupation period might be applied, and, since there was no debit balance which arose during the occupation period at the time when the first payment after the beginning of the occupation period was made by the respondent, section 8 did not cover that case, and there was nothing to prevent that payment being applied, in accordance with the rule in *Clayton's* case (1816) 1 Mer. 572, 605, in reduction of the pre-occupation debt.

Similarly, each subsequent payment by the respondent during the occupation period must be treated as having been applied *first* to any debit balance which arose during the occupation period and existed at the time of the payment, and, subject thereto, must be treated as having been applied in reduction of the pre-occupation debt of $49,900. Each payment applied in the latter manner was a "payment made during the occupation period . . . by a debtor ". . . to a creditor . . . in respect of a pre-occupation debt" within section 4 of the Ordinance, and was, therefore, "a valid "discharge of such pre-occupation debt to the extent of the face "value of such payment" by virtue of that section. By those means the pre-occupation debt of $49,900 was fully discharged by January 4, 1943.

To give effect to the appellants' contention it would be necessary to read the word "first" in section 8 as meaning "exclusively," which was an impossible construction.

Judgment of the Court of Appeal of the Federation of Malaya affirmed.

APPEAL (No. 23 of 1954) from a judgment and decree of the Court of Appeal of the Federation of Malaya (March 21, 1952) affirming a judgment and decree of the High Court of the Federation of Malaya at Penang (August 31, 1951) dismissing the action brought by the appellants against the respondent.

The following facts and statutory provisions are taken from the judgment of the Judicial Committee: It was alleged in the statement of claim, and admitted by the defence, that the appellants were a firm of moneylenders carrying on business at 35, New Lane, Penang; that the respondent was also a moneylender carrying on business also at 35, New Lane, Penang; and that in or about the month of February, 1939, the appellants and the respondent commenced to have dealings between each other on current account, on terms that interest on the appropriate balances should be calculated and debited at the end of every six monthly period in such account, in accordance with the usual Penang current account rate as fixed by Chettiar custom from time to time.

Paragraphs 4–6 of the statement of claim were in the following terms:—

"4. This current account was continued and carried on "between the plaintiffs and the defendant up to the beginning of "the occupation period and there was as on the 15th day of "February, 1942, a sum of $49,900/- due and payable by the "defendant to the plaintiffs.

"5. This current account was continued to be operated during "the occupation period and was closed on or about the 6th day of "August, 1945, there being no balance due and payable by the "defendant to the plaintiffs as on that date.

"6. The plaintiffs are entitled to be repaid by the defendant "the said sum of $49,900/- being the pre-occupation debit "balance against the defendant on the said account having regard "to the provisions of section 8 of the Debtor and Creditor "(Occupation Period) Ordinance, 42 of 1948."

Then followed a claim for the sum of $49,900/- with certain interest.

Paragraph 2 of the defence was as follows:—"2. As to paragraphs 4 and 5 of the statement of claim the defendant says that "the current account referred to was carried on and continued "to be operated by the parties from February, 1939, until August, "1945, and that the credit balance of $49,900/- in favour of the "plaintiffs, as on the 15th day of February, 1942, was paid off by "reason of the plaintiffs' drawings by the 4th day of January, "1943, on which date the amount standing to the credit of the "plaintiffs was nil."

The appellants relied upon the terms of the Debtor and Creditor (Occupation Period) Ordinance 1948 (No. 42 of 1948), which was headed "An Ordinance to regulate the relationship "between debtors and creditors in respect of debts incurred prior "to and during the period of the enemy occupation of the "territories comprising the Federation of Malaya." It came into force on October 1, 1949.

Section 2 (1) contained the following definitions:—

"In this Ordinance, unless the context otherwise requires, "the following expressions shall have the meanings hereby "respectively assigned to them, that is to say—

. . . . . .

"'debt' means a sum certain in money payable by virtue of "a legal obligation and recoverable when due by process of law;

"'Malayan currency' means the dollar currency in circulation "and constituting legal tender in the territories now comprising "Malaya before or after the occupation period;

"'occupation currency' means any currency issued by the "Occupying Power and in circulation during the occupation "period, but does not include Malayan currency;

"'occupation debt' means a debt payable by virtue of an "obligation incurred during the occupation period and accruing "due at any time;

"'occupation period' means the period commencing on the "fifteenth day of February, 1942, and ending on the fifth day of "September, 1945, both dates inclusive, and includes any part "of such period;

"'pre-occupation debt' means a debt payable by virtue of an "obligation incurred prior to the commencement of the occupation "period and accruing due at any time;

"'time essence contract' means a contract the parties to "which intended that it should be of the essence of the contract "that payments under it should be made on a date or dates "certain."

Section 3 provided that, subject to the provisions of section 7, any pre-occupation debt which still remained wholly unpaid at the commencement of the Ordinance should be payable in full with interest calculated in a manner there specified.

Section 4, so far as material, was as follows:—

"(1) Subject to the provisions of subsection (2) of this section, "where any payment was made during the occupation period in "Malayan currency or occupation currency by a debtor or by his "agent . . . to a creditor, or to his agent . . . and such payment "was made in respect of a pre-occupation debt, such payment "shall be a valid discharge of such pre-occupation debt to the "extent of the face value of such payment.

"(2) In any case—

"(*a*) where the acceptance of such payment in occupa- "tion currency was caused by duress or coercion; or

"(*b*) where such payment was made after the thirty-first "day of December, 1943, in occupation currency in respect "of a pre-occupation capital debt, exceeding two hundred "and fifty dollars in amount, which—

"(i) was not due at the time of such payment; or

"(ii) if due, was not demanded by the creditor or by "his agent on his behalf and was not payable within "the occupation period under a time essence contract; "or

"(iii) if due and demanded as aforesaid was not paid "within three months of demand or within such "extended period as was mutually agreed between the "creditor or his agent and the debtor or his agent; or

"(*c*) where such payment was made in occupation "currency to a Custodian or liquidation officer in respect of "a pre-occupation capital debt exceeding two hundred and "fifty dollars in amount except where payment as aforesaid "was caused by duress or coercion;

"such payment shall be revalued in accordance with the scale "set out in the Schedule to this Ordinance and shall be a valid "discharge of such debt only to the extent of such revaluation."

Section 5 provided that any payment made during the occupation period by a debtor or his agent to a creditor or his agent in respect of an occupation debt should be a valid discharge of such debt to the extent of the face value of such payment. Section 6 dealt with occupation debts which still remained unpaid at the commencement of the Ordinance and need not be set out here. Section 7 made certain special provisions in regard to bank accounts.

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Section 8 provided:—

"For the purposes of this Ordinance—

"(*a*) any payment made by, or on behalf of, any person "into any bank or other account during the occupation period "shall be deemed to have been applied first to any debit "balance, or part thereof, which arose during the occupation "period and was still outstanding against such person in "such account at the time when such payment was made; "and

"(*b*) any withdrawal made by, or on behalf of, any "person from any bank or other account during the occupation period shall be deemed to have been applied first "against any credit balance, or part thereof, which arose "during the occupation period and was still outstanding in "favour of such person at the time when such withdrawal "was made."

The Schedule set out a sliding scale of the value of occupation currency from February, 1942, to June 13, 1945. During the year 1942 occupation currency was treated as being of the same value as Malayan currency; in January, 1943, 105 occupation dollars were treated as being equivalent to 100 Malayan dollars, and thereafter the value of occupation currency diminished, at first slowly but later very rapidly, until on August 6, 1945, the figure was 35,500, on August 12 the figure was 95,000, and on August 13 occupation currency became valueless.

The trial judge (Abbott J.) dismissed the action, holding that section 4 (1) of the Ordinance applied, and that the pre-occupation debt of $49,900 became liquidated by January 4, 1943. An appeal by the present appellants was dismissed by the Court of Appeal for the Federation of Malaya (Mathew C.J. (Federation of Malaya), Murray-Aynsley C.J. (Singapore) and Pretheroe J.).

1954. Dec. 13, 14. *Phineas Quass Q.C.* and *Dingle Foot Q.C.* for the appellants. The Court of Appeal were wrong in basing their judgments, in effect, on the application of the rule in *Clayton's* case.[1] The position which arises on the facts of the present case is specifically provided for in the Ordinance of 1948, which is intended to be a complete code of the relationship as between creditors and debtors. There is no room in this case for the application of the rule in *Clayton's* case.[1] A sharp line is drawn between pre-occupation and occupation debts. It must be a question of fact whether a payment was one made in respect of an existing debt. Section 8 applies to payments and withdrawals arising in the occupation period only, and no such payments or withdrawals should be set off against pre-occupation debts and credits until a balance for the occupation period has been struck and revalued according to the Ordinance. Section 4 (1) of the Ordinance does not apply because there is no evidence that money which was paid into this account was paid in respect of pre-occupation debt. If the Court of Appeal is right, then section 8 has no application to cases which it was clearly intended to cover. Nowhere in this Ordinance does it say that occupation payments shall be appropriated to pre-occupation debts. The only reasonable way to apply section 8 is by drawing a line between pre-occupation and occupation debts. The trial judge and the Court of Appeal misdirected themselves as to the law and did not properly apply the legal effect of section 8 to the facts of this case.

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[1] (1816) 1 Mer. 572, 605.

Dingle Foot Q.C. following. The legislature intended to provide a complete code covering this branch of the law. That being so, it is not a proper method of construction to import the doctrines of the common law; they have been replaced by the Ordinance: that principle is illustrated by *Wallace-Johnson* v. *The King.*[2] They were here setting out to regulate the whole relationship of debtor and creditor during the occupation period, and the Ordinance is designed to protect two classes of persons: (1) a pre-occupation creditor who has been paid during the occupation in depreciated currency; and (2) a debtor whose debt has been incurred during the occupation and who is called upon to satisfy after the occupation a debt which he has incurred in depreciated currency. In each case it is to protect against the consequences of depreciation during the occupation period. It would be defeating the whole purpose of this Ordinance if the interpretation placed by the Court of Appeal on section 8 is right. The Board should lean against such an interpretation. Sections 4 and 8 are intended to deal with different things.

Milner Holland Q.C. and *T. A. C. Burgess* for the respondent. The Ordinance, with such defects as are inherent in a provision intended to prevent injustice, is consistent and intelligible and no words need be added to make it operate intelligibly according to its terms. The substantive provisions are sections 3, 4, 5 and 6, which provide in themselves a code for dealing with debts before and after the occupation. Sections 7 and 8 are designed to provide special rules for the application and interpretation of the code laid down in sections 3 to 6. The Ordinance deals with (1) pre-occupation debts unpaid at the commencement of the Ordinance: section 3; (2) pre-occupation debts paid during the occupation: section 4; (3) occupation debts paid during the occupation: section 5; and (4) occupation debts unpaid at the commencement of the Ordinance: section 6. Those four sections constitute the primary code laid down by this Ordinance. Section 7 deals with the matter of a customer transferring money to another account in his own name in the same bank. With regard to section 8, reliance is placed on the word "first" in both the subsections of section 8; it implies that something is to happen after "first." It is a modification of the rule in *Clayton's* case[3]; section 8 should be applied so far as it is applicable, but it is exhausted when the payment in has been "first" applied to the occupation debit or credit; the section does not provide anything else.

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[2] [1940] A.C. 231, 239; 56 T.L.R. 215.

On the true construction of the Ordinance the rule in *Clayton's* case[3] remains applicable except in so far as it is thereby expressly varied, and where at any time during the occupation period there was no occupation debit balance against which any credit could be set off, then such credit is under section 4 (1) of the Ordinance and in accordance with the rule in *Clayton's* case[3] to be applied in reduction of the debt outstanding at the commencement of the occupation period. The contention of the appellants gives to the words of section 8 an unnatural meaning in that "first" is construed as "exclusively."

Phineas Quass Q.C. in reply. The point on section 4 was abandoned in the Court of Appeal, and only in very exceptional circumstances will the Board entertain a point which has been abandoned below: *Ahamath* v. *Sariffa Umma*[4]; *Fanny Skinner* v. *Bank of Upper India Ld.*[5] It was said for the respondent that section 8 should be read together with section 4. If the latter section applies to this case the respondent is right if he can show that the payments made in the occupation period were in respect of pre-occupation debts. It is submitted that section 4 does not apply here, and secondly, that the respondent should not be allowed to say that it does. The position on the decision appealed from is as if there were no section 8 in the Ordinance at all.

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[3] 1 Mer. 572, 605.

[4] [1931] A.C. 799, 803.

[5] (1935) L.R. 62 I.A. 115.

1955. January 11. The judgment of their Lordships was delivered by LORD MORTON OF HENRYTON, who stated the facts set out above, saying that the issues in the action were clearly and simply set out in the pleadings. The vital portion of the defence was paragraph 2. He continued: No oral evidence was called at the trial, but certain documents were put in, including Exhibit No. 1, which shows the current account of the respondent, as kept in the books of the appellants, from October, 1941, onwards. The books kept by the respondent agree in every particular with Exhibit No. 1.

Up to August 6, 1945, the account shows frequent entries to the credit and debit of the respondent, and the balance is struck and interest debited every six months, in April and October each year. The account shows that on October 17, 1941, the respondent's account was in debit to the amount of $41,900, and at the beginning of the occupation period (February 15, 1942) the debit balance had risen to $49,900, the amount now claimed. Throughout the occupation period and thereafter the account continued to be kept in the same way as before.

The debit balance against the respondent tended to decrease after February 15, 1942, and on January 4, 1943, he made a payment of $1,550 which exactly cleared off the amount of his then debit balance. Many further debit and credit entries are recorded until on August 6, 1945, the respondent paid a sum of $31,400, which cleared off his debit balance as at that date. This is the last entry before the occupation period ended on September 5, 1945. From that date onwards only a few small dealings took place between the parties.

The respondent accepts as correct the allegation in paragraph 4 of the statement of claim that a sum of $49,900 was due and payable to the appellants when the occupation period began, but, as appears from his defence, he contends that he discharged that debt by a series of payments the last of which was the payment of $1,550 on January 4, 1943.

Counsel for the appellants contended that none of the payments made during the occupation period could be applied in or towards discharge of a pre-occupation debt, and they relied upon section 8 of the Ordinance. They first suggested that as section 8 applies only to payments and withdrawals made during the occupation period, a line should be ruled across the account immediately below an entry of $200 to the credit of the respondent on February 11, 1942. So far their Lordships agree, as this was the last pre-occupation entry. It reduced the total sum standing to the debit of the respondent to $49,900, and that sum, in their Lordships' view, falls exactly within the definition (already quoted) of a pre-occupation debt which appears in section 2 (1) of the Ordinance.

Counsel went on to suggest that a second line should be ruled immediately below the credit of $31,400, already mentioned, which appears at the date August 6, 1945. Between these two lines are recorded all the debits and credits during the occupation period, and counsel contended that, by virtue of section 8 (*a*) of the Ordinance, every payment made by the respondent during that period must be set off against sums drawn by him from the appellants during the same period, and no such payment could be applied to reducing the pre-occupation debt of $49,900.

It is common ground between the parties that the common law of England must be applied in the present case, except in so far as it is expressly varied by the terms of the Ordinance. See section 2 (1) of the Civil Law Enactment, 1937 (No. 3 of 1937). The common law rule applicable to the circumstances of this case is stated by Lord Selborne in *In re Sherry*[1]: "The principle of "*Clayton's* case[2] and of the other cases which deal with the "same subject, is this, that where a creditor having a right to "appropriate moneys paid to him generally, and not specifically "appropriated by the person paying them, carries them into a "particular account kept in his books, he prima facie appropriates "them to that account, and the effect of that is, that the payments are de facto appropriated according to the priority in "order of the entries on the one side and on the other of that "account."

In the present case, both debtor and creditor carried all payments made by either of them to the other to a current account, and if there had been no statutory provision to the contrary the pre-occupation debt would have been discharged by the payments made by the respondent between February 15, 1942, and January 4, 1943. All these payments, however, were payments made during the occupation period, and section 8 of the Ordinance applies to them. Their Lordships agree with Pretheroe J. that the effect of section 8 can conveniently be illustrated by considering the first entry made in the accounts after the beginning of the occupation period. That entry recorded a payment of $700 by the respondent to the appellants. On that date there was no "debit balance which arose during the occupation period," and

[1] (1884) 25 Ch.D. 692, 702.

[2] (1816) 1 Mer. 572, 605.

counsel for the appellants contended that it could not be applied in reduction of the pre-occupation debt of $49,900 but must be deemed to have been held in suspense until there appeared in the account a debit balance arising during the occupation period. Their Lordships cannot accept this contention. By section 8 of the Ordinance such a payment is to be deemed to have been applied *first* to any debit balance which arose during the occupation period. In order to give effect to the appellants' contention it would be necessary to read the word "first" as meaning "exclusively." In their Lordships' view this is an impossible construction. The word "first" implies that there is some other purpose to which a payment made during the occupation period may be applied. As there was no debit balance arising during the occupation period at the time when the payment of $700 was made, section 8 does not cover the case and there is nothing to prevent the $700 being applied, in accordance with the rule in *Clayton's* case,[2] in reduction of the pre-occupation debt. Similarly, each subsequent payment by the respondent during the occupation period must be treated as having been applied first to any debit balance arising during the occupation period and existing at the time of the payment, and subject thereto, must be treated as having been applied in reduction of the pre-occupation debt of $49,900. Each payment applied in the latter manner is, in their Lordships' view, a "payment made during the occupation period . . . by a debtor . . . to a creditor . . . in respect of a pre-occupation debt," within section 4 of the Ordinance, and is, therefore, "a valid discharge of such pre-occupation debt to the extent of the face value of such payment" by virtue of the same section. By these means the pre-occupation debt of $49,900 was fully discharged on January 4, 1943, and the appellants' claim fails.

Subsection (2) of section 4 can have no application to the present case, since there is no suggestion of duress or coercion and all the payments which discharged the pre-occupation debt were made before December 31, 1943.

For these reasons their Lordships will humbly advise Her Majesty that this appeal should be dismissed. The appellants must pay the respondent's costs.

Solicitors: *Barrow, Rogers & Nevill; Lawrance, Messer & Co.*

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[2] (1816) 1 Mer. 572, 605.

HUGHES AND VALE PROPRIETARY LD. . APPELLANT;

AND

STATE OF NEW SOUTH WALES AND OTHERS . RESPONDENTS.

AND

COMMONWEALTH OF AUSTRALIA AND OTHERS . . . . INTERVENERS.

J. C.*

1954
Nov. 17.

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

Australia (*New South Wales*)—*State Act—Constitutional validity—Road traffic—Goods vehicle—Licence—Inter-State trade—To be "absolutely free"—Licensing provisions invalid—Stare decisis—State Transport* (*Co-ordination*) *Act*, 1931–1951 (*N.S.W.*), *ss.* 12, 14, 17, 18, 19, 22, 37—*Commonwealth of Australia Constitution Act*, 1900 (63 & 64 *Vict. c.* 12), *s.* 92.

Road Traffic. Statute — Dominion — Validity. Judicial Precedent — Decision long undisturbed — Conflict of judicial opinion — Stare decisis inapplicable.

The provisions of the State Transport (Co-ordination) Act, 1931–1951, of the State of New South Wales, requiring application to be made for a licence—which may be granted or refused by an official of the Executive in his uncontrolled discretion—and all provisions consequential thereon, in so far as they purport to apply to, and to the operators of, public motor-vehicles operated in the course of and for the purposes of inter-State trade, are invalid as contravening section 92 of the Constitution of the Commonwealth of Australia, which provides that ". . . trade, commerce, and "intercourse among the States, whether by means of internal "carriage or ocean navigation, shall be absolutely free."

Accordingly, all the licensing provisions of the Act were inapplicable to the appellant company, which carried on business as a motor-carrier of general merchandise between Sydney, in the State of New South Wales, and Brisbane, in the State of Queensland, and to the vehicles while so operated.

Rex v. *Vizzard* (1933) 50 C.L.R. 30, which has been followed in a number of transport cases, including *McCarter* v. *Brodie* (1950) 80 C.L.R. 432, decided after *Commonwealth of Australia* v. *Bank of New South Wales* [1950] A.C. 235; 65 T.L.R. 633; [1949] 2 All E.R. 755, overruled: *Rex* v. *Vizzard* had never been approved by the Judicial Committee, and there was no ground for the application of the maxim stare decisis.

Dicta of Dixon J. in his dissenting judgment in *McCarter* v. *Brodie*, 80 C.L.R. 432, at 465, approved; as also the dicta of Fullagar J. in the same case, at p. 495, to the effect that the

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* *Present*: LORD OAKSEY, LORD MORTON OF HENRYTON, LORD REID, LORD TUCKER and LORD COHEN.

Victorian Transport Regulation Act there in question was not merely regulatory so far as it affected inter-State trade and commerce, and those dicta were equally applicable to the New South Wales Act.

James v. *Commonwealth of Australia* [1936] A.C. 578; 52 T.L.R. 696; [1936] 2 All E.R. 1449 considered.

There were no circumstances in the present case giving rise to the situation contemplated in the judgment in the *Bank of New South Wales* case [1950] A.C. at p. 311, that " Every case must " be judged on its own facts and in its own setting of time and " circumstance, and it may be that in regard to some economic " activities and at some stage of social development it might be " maintained that prohibition with a view to State monopoly was " the only practical and reasonable manner of regulation, and that " inter-State trade, commerce and intercourse thus prohibited and " thus monopolized remained absolutely free." No facts were proved here on which an argument on that passage could be based.

Lastly, the effect of section 3 (2) of the Act, which provides that " This Act shall be read and construed so as not to exceed " the legislative power of the State to the intent that where any " enactment thereof would, but for this subsection, have been " construed as being in excess of that power, it shall nevertheless " be a valid enactment to the extent to which it is not in excess " of that power," is that the Act may not be wholly invalid (and it was not suggested for the appellant that its provisions were invalid in so far as they applied to intra-State transport), but that its licensing provisions are inapplicable to the appellant.

Judgment of the High Court of Australia (1953) 87 C.L.R. 49 reversed.

APPEAL (No. 40 of 1953), by special leave, from a judgment and order of the High Court of Australia (April 16, 1953), overruling by a majority (Dixon C.J., McTiernan, Williams and Webb JJ.—Fullagar, Kitto and Taylor JJ. dissenting) a demurrer by the plaintiff (appellant) to the defence of the defendants (respondents). In overruling the appellant's demurrer the High Court held that the State Transport (Co-ordination) Act, 1931–1951 (hereafter referred to as " the Transport Act ") was within the powers of the Parliament of the State of New South Wales and did not infringe section 92 of the Constitution of the Commonwealth of Australia.

The appellant, who carried on business as a motor carrier of general merchandise between Sydney, in the State of New South Wales, and Brisbane, in the State of Queensland, brought the action claiming declarations that the Transport Act and certain charges levied thereunder were invalid. At the hearing of the appeal, however, the appellant sought only to obtain a declaration to the effect that the licensing provisions of the Act were

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inapplicable to the appellant while operating its vehicles in the course of and for the purposes of inter-State trade, or to the vehicles while so operated.

The Commonwealth of Australia and the States of Victoria and Queensland intervened in the appeal.

The most relevant sections of the Australian Constitution and of the Transport Act were as follows:

The Commonwealth of Australia Constitution Act, 1900:—

" S. 51. The Parliament shall, subject to this Constitution, " have power to make laws for the peace, order and good government of the Commonwealth with respect to:

"(1) Trade and commerce with other countries, and among the " States; . . .

" S. 92. On the imposition of uniform duties of customs, " trade, commerce, and intercourse among the States, whether " by means of internal carriage or ocean navigation, shall be " absolutely free.

" S. 107. Every power of the Parliament of a Colony which " has become or becomes a State, shall unless it is by this " Constitution exclusively vested in the Parliament of the " Commonwealth or withdrawn from the Parliament of the State, " continue as at the establishment of the Commonwealth, or as " at the admission or establishment of the State, as the case may " be."

New South Wales State Transport (Co-ordination) Act, 1931–1951:—

" S. 3 (1) . . . ' Motor vehicle ' means any vehicle whatsoever " propelled by mechanical means and includes a tractor or trailer " and also includes aircraft, but does not include a vehicle used " on a railway or tramway. . . . ' Operate ' means carry or offer to " carry passengers or goods for hire or for any consideration or in " the course of any trade or business whatsoever. . . . ' Public " ' motor vehicle ' means a motor vehicle (as hereinbefore " defined)—(i) used or let or intended to be used or let for the " conveyance of passengers or of goods for hire or for any consideration or in the course of any trade or business whatsoever, " or (ii) plying or travelling or standing in a public street for or in " hire or in the course of any trade or business whatsoever. . . .

" (2) This Act shall be read and construed so as not to exceed " the legislative power of the State to the intent that where any " enactment thereof would, but for this subsection, have been " construed as being in excess of that power, it shall nevertheless "be a valid enactment to the extent to which it is not in excess "of that power.

"S. 12 (1). Any person who after a date appointed by the "Governor and notified by proclamation published in the Gazette "operates a public motor vehicle shall, unless such vehicle is "licensed under this Act by the board and unless he is the "holder of such licence, be guilty of an offence against this Act: "Provided that this subsection shall not apply to a public motor "vehicle that is being operated under and in accordance with an "exemption from the requirement of being licensed granted under "section nineteen or a permit granted under section twenty-two "of this Act."

Section 14 (1)—as amended by section 7 of the Motor Traffic (Amendment) Act, 1951: "Every person desiring to operate a "public motor vehicle shall in addition to any licence or registration which by law he is required to hold or effect, apply to the "board or to the prescribed person or authority for a licence for "such vehicle under this Act.

"(2) The application for a licence shall be made in the "prescribed form and manner and shall contain the following "particulars:— . . .

"(3) The application shall be accompanied by the prescribed "fee.

"(4) The prescribed fee shall be payable in respect of every "renewal of any such licence."

The "board" referred to in this and other sections was a board of four commissioners to be appointed by the Governor, in exercise of a power conferred by section 4, and the section provided that the board should "subject to the control of the "Minister, carry into effect the objects and purposes of the Act "and have and discharge the duties, powers, and functions "thereby conferred and imposed."

The board was called the State Transport (Co-ordination) Board, and it was the licensing authority. Its subsequent history was described as follows by Dixon C.J.[1]: "This board was superseded as long ago as March 22, 1932. Since then not a few "statutory changes have taken place and now, after the field of "transport administration and control has undergone more than "one division, the powers and authorities conferred by the Act "with respect to road transport and probably aircraft have come "to reside in an officer called the Director of Transport and

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[1] 87 C.L.R. 49, 67.

" Highways. He is constituted a corporation sole but in his " natural capacity he is the chairman of a commission called the " New South Wales Transport and Highways Commission, the " functions of which seem to be rather to plan and recommend " than to administer. As chairman, moreover, the Director has " the privilege of submitting any decision of the Commission of " which he disapproves to the Minister, who may then determine " whether the decision is or is not to be carried into effect: see " Act No. 10 of 1950, sections 3, 4, 6 (4) and 8. In his corporate " capacity the Director of Transport and Highways is the road " transport authority of the State. But in the exercise and per" formance of the powers, duties and functions conferred upon " him as a result of the various statutes he is subject to the " direction and control of the Minister: Act No. 15 of 1952, " section 3 (4). No purpose would be served by recounting the " legislative steps by which the Director became the road " transport authority. It is enough to mention the successive " provisions from which the result ensues, which are: No. 3 of " 1932, sections 9 (1) and 12 (2); No. 31 of 1932, sections 5, 14 " (1) and (2), and 20 (1) (*b*) and (2) (*c*); No. 10 of 1950, sections 3, " 6 and 8 (1) (*g*) and (2); No. 15 of 1952, section 2, section 3 " considered with section 4, sections 5 (1), 11, 17 (1) (*a*) and " (2) (*a*).

" The duties and powers of the Directors of Transport and " Highways do not extend in any way into the field of railway " or tramway administration or transport by sea. Whatever " ' co-ordinating ' he does must be effected by his control of " carriage by road. From a practical point of view air transport " may be put aside, assuming his authority extends to it."

" S. 17 (1) Every licence under this Act shall be subject to the " performance and observance by the licensee of the provisions " of this Act and the regulations that may relate to the licence or " to the public motor vehicle in respect of which it is issued, and " of the provisions contained in or attaching to the licence, and " all such provisions shall be conditions of the licence.

" (2) The regulations may prescribe, or the board may deter" mine in respect of any particular licence, or of any class of " licences relating to any area, route, road, or district, or of any " other class of licences whatsoever, or generally what terms and " conditions shall be applicable to or with respect to a licence, " including (but without in any way limiting the generality of the " foregoing—(*a*) the fares, freights, or charges, or the maximum " or minimum fares, freights, or charges to be made in respect of

" any services to be provided by means of the public motor vehicle " referred to in the licence; (*b*) the use of such public motor " vehicles as to whether passengers only or goods only or goods " of a specified class or description only shall be thereby conveyed, " and as to the circumstances in which such conveyance may be " made or may not be made (including the limiting of the number " of the passengers or the quantity, weight, or bulk of the goods " that may be carried on the vehicle).

" (3) In dealing with an application for a licence the board " shall consider all such matters as they may think necessary or " desirable, and in particular (where applicable) shall have regard " to—(*a*) the suitability of the route or road on which a service " may be provided under the licence; (*b*) the extent, if any, to " which the needs of the proposed areas or districts, or any of " them, are already adequately served; (*c*) the extent to which " the proposed service is necessary or desirable in the public " interest; (*d*) the needs of the district, area, or locality as a " whole in relation to traffic, the elimination of unnecessary " services, and the co-ordination of all forms of transport, including transport by rail or tram; (*e*) the condition of the roads to " be traversed with regard to their capacity to carry proposed " public vehicular traffic without unreasonable damage to such " roads; (*f*) the suitability and fitness of applicant to hold the " licence applied for; (*g*) the construction and equipment of the " vehicle and its fitness and suitability for a licence: Provided " that the certificate of registration and the certificate of airworthiness of an aircraft issued under the Air Navigation " Regulations or a registration of any motor vehicle other than " aircraft under any other Act of the State may be accepted as " sufficient evidence of suitability and fitness of the vehicle.

" (4) The board shall have power to grant or refuse any " application of any person for a licence or in respect of any " vehicle or of any area, route, road, or district.

" (5) If the holder of any licence of a public motor vehicle " under this Act, or the owner of any public motor vehicle so " licensed, fails to comply with or observe any of the terms or " conditions of or attaching to such licence he shall be guilty of " an offence against this Act.

" S. 18 . . . (5) The board may, in any licence for a public " motor vehicle to be issued under this Act that authorizes the " holder to carry goods or goods and passengers in the vehicle, " impose a condition that the licensee shall pay to them (and in

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" addition to any other sums payable under the preceding sub-
" section and any other provision of this Act) such sums as shall
" be ascertained as the board may determine.

" The board may determine that the sum or sums so to be
" paid may be differently ascertained in respect of different
" licences and may be ascertained on the basis of mileage travelled
" as hereinafter mentioned or may be ascertained in any other
" method or according to any other basis or system that may be
" prescribed by regulation made under this Act:

" Provided that if the sum or sums so to be paid are to be
" ascertained according to mileage travelled they shall not exceed
" an amount calculated at the rate of threepence per ton or part
" thereof of the aggregate of the weight of the vehicle unladen
" and of the weight of loading the vehicle is capable of carrying
" (whether such weight is carried or not) for each mile or part
" thereof travelled by the vehicle along a public street (which
" mileage may be ascertained for such purposes as prescribed by
" the regulations or as determined by the board), and if the sum
" or sums so to be paid to the board are not to be ascertained
" according to mileage travelled then the board shall repay to
" the persons entitled thereto any moneys received by the board
" under this subsection in excess of the amount that would have
" been payable to the board calculated on the mileage basis in
" the foregoing manner during the period of the licence.

" For the purposes of this proviso the weight of the vehicle
" unladen and the weight of loading the vehicle is capable of
" carrying shall be as mentioned in the licence or as determined
" by the board. . . .

" (11) Where the board at any time thinks it desirable that
" any of the terms, conditions, and authorities in respect of any
" licence for a public motor vehicle should be varied during the
" currency thereof, or that any new term, condition or authority
" should be attached to any such licence during its currency,
" they may, subject to this Act and the regulations, vary the
" same or attach thereto such term, condition or authority
" accordingly, and the terms, conditions and authorities as so
" varied or added to as the case may be shall thereafter be the
" terms, conditions and authorities of the licence."

In granting licences to the appellant under this section the authorities had imposed certain mileage charges. It was unnecessary to describe those charges in detail, but it was not in doubt that the object of those charges was to protect the railways in

New South Wales from competition, as part of a system for "co-ordinating transport."

"S. 19 (1) The board may grant exemption from the requirements to be licensed under this Act in respect of any public motor vehicle or class of public motor vehicles in such cases and under such conditions as they think fit. (2) The board may from time to time vary or revoke any such exemption. (3) Any person who commits a breach of any condition imposed under this section shall be guilty of an offence against this Act."

"S. 22 (1) The board may, on payment of the prescribed fees, issue permits, for such period as it thinks fit and subject to any conditions that may be prescribed or imposed by the board, permitting the carrying on a motor vehicle of persons in or over specified districts or routes.

"(2) Any such permit may be revoked or varied at any time by the board.

"(3) Any person who commits a breach of any of the conditions of a permit shall be guilty of an offence against this Act."

"S. 37 (1) If any person operates any public motor vehicle in contravention of this Act the board may impose upon him an obligation to pay to them on demand such sums as the board determines, but such sums shall not exceed the sums that could have been made payable to the board under subsections four and five of section eighteen had the person operating the vehicle been the holder of a licence to operate it and had the board imposed therein the conditions provided by such subsections.

"(2) This section shall not relieve such person or any other person from the penalties for the offence."

1954. April 28, 29; May 3, 5, 6, 10, 11, 12, 13, 17, 18, 19, 20, 24, 25, 26, 27, 28, 31; June 3. *Sir Garfield Barwick Q.C.* (Australia), *J. D. Holmes Q.C.* (Australia) and *G. D. Needham* (Australia) for the appellant. The scheme of the State Transport (Co-ordination) Act of New South Wales—most of the other States have comparable legislation, not identical in detail, but broadly similar in principle—is to prohibit the commercial use of motor-vehicles except under licence. The licence may be granted or withheld at the discretion of the Board or an official as the case may be. There is no right given to anybody to have a licence; no duty to grant it; and no conditions are laid down on the performance of which a licence may issue. The licensing authority is authorized to impose conditions when granting the licence;

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they are described as such conditions as the Board may determine, and the conditions include the imposition of an obligation to pay a levy or charge—the mileage charge—quantified and charged as the Board thinks fit, but up to the maximum set by statute. The Privy Council has decided with respect to the constitutional provision in section 92 of the Constitution that it withdraws from all governments, State and Commonwealth, power to restrict, burden or impair the freedom of individuals to engage in inter-State trade; that simple prohibition denies that absolute freedom; and that while the Parliaments might regulate inter-State trade, simple prohibition is not a regulation of trade. The Board has also held that mere exclusion of competition is not regulation in the relevant sense. Those propositions recognized that freedom of Australians to engage in inter-State trade was basic to the original contract, and basic to any federal system. One other matter is beyond question; it has been held that a carrier engaged in inter-State transportation is himself engaged in inter-State trade and commerce.

The questions in this appeal are: (1) Whether a prohibition of the commercial use of motor-vehicles except by permission of an official, which permission he is free to grant or withhold, is compatible with freedom of a carrier to engage in inter-State trade, which is guaranteed by section 92. (2) If yes—and this second question only arises if the first question is answered against the appellant—whether such prohibition except with such permission and upon payment of a levy quantified and charged upon such basis as such an official may determine, subject to a statutory maximum, is compatible with such freedom.

It is not possible for the appellant in this case to discuss the questions in point of principle, for there are a number of authorities to the effect that an Act such as this is valid, and the appellant seeks to overturn those authorities. Altogether there are eight cases, of which six were decided before the decision of this Board in *Commonwealth of Australia* v. *Bank of New South Wales*,[2] and two, of which the present case is the second, were decided subsequently. The first, *Willard* v. *Rawson*,[3] is different from the present case in that the provisions in question there were for the registration of motor-vehicles. The question of inter-State freedom of trade arose; but it is not necessary for the appellant's success here that that case should be overturned if it is understood in the sense of being a mere traffic regulation. In *Rex* v.

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[2] [1950] A.C. 235; 65 T.L.R. 633; [1949] 2 All E.R. 755.

[3] (1933) 48 C.L.R. 316.

Vizzard[4] the statute was the same as in the present case, and it related to a carrier. *O. Gilpin Ld.* v. *Commissioner of Road Transport*[5] was a case of an owner carrying his own goods inter-State, and the Act was held to apply to him; it was the same Act as in *Vizzard's* case.[6] *Bessell* v. *Dayman*[7] was a case of a carrier, and it arose under a South Australian Act in somewhat similar terms to the present Act. *Duncan and Green Star Trading Co.* v. *Vizzard*[8] was again on the present Act, which was held binding and valid. In *Riverina Transport Pty. Ld.* v. *Victoria*[9] a Victorian Act was allowed to have this operation: that the administrators under the Act were held entitled to exclude an inter-State carrier specifically and to refuse a licence because he was an inter-State trader. That case was decided after this Board had decided *James* v. *The Commonwealth*,[10] in which the principal question was whether section 92 of the Constitution bound the Commonwealth, and it was held that it did; and the Board held that a law which forbade the transport of goods from one State to another without a licence was invalid.

As already indicated, the matter cannot be debated merely as a point of principle, and it will be necessary to go through the decisions to show that the grounds taken for judgment in those decisions have all been displaced by this Board's decisions in *James* v. *Cowan*,[11] *James* v. *The Commonwealth*[12] and the *Bank* case.[13] Since the decision in the *Bank* case[13] there have been two decisions on this type of legislation, first, *McCarter* v. *Brodie*,[14] a decision on the Victorian Act, which was considered in the *Riverina* case,[15] and secondly, the present case. After *McCarter's* case[14] two new grounds were advanced for supporting the Act: (i) that it was regulatory in character so as to fall within the decision in the *Bank* case,[16] and (ii) the State's power to control its own roads was sufficient to support the Act. The argument that this Act is regulatory is founded on some remarks in the judgment in the *Bank* case[16]; so the meaning of that judgment as well as the character of the legislation there in question will fall for discussion. One further reason advanced for supporting the decisions in the transport cases was the view

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[4] (1933) 50 C.L.R. 30.
[5] (1935) 52 C.L.R. 189.
[6] 50 C.L.R. 30.
[7] (1935) 52 C.L.R. 215.
[8] (1935) 53 C.L.R. 493.
[9] (1937) 57 C.L.R. 327.
[10] [1936] A.C. 578; 52 T.L.R. 696; [1936] 2 All E.R. 1449.
[11] [1932] A.C. 542; 48 T.L.R. 564.
[12] [1936] A.C. 578.
[13] [1950] A.C. 235.
[14] (1950) 80 C.L.R. 432.
[15] 57 C.L.R. 327.
[16] [1950] A.C. 235.

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that this Board had approved *Vizzard's* case[17] in *James* v. *The Commonwealth*,[18] and had at least canvassed the case in the *Bank* case,[19] and therefore, it was said, those cases should be followed. One cannot find, however, any thread of reasoning running through those judgments in favour of validity; the basis of the decisions varied from time to time.

This matter can never be tested by the needs of the State; it is a federal matter in which all the States have an interest: *Tasmania* v. *Victoria*[20]; *Duncan* v. *State of Queensland*.[21] For a compliance with section 92 there should not be taxes or tolls or restrictions which are not mere regulations laid upon the use of the roads. It was suggested that because the Board could be compelled by mandamus to consider the matter of the issue of a licence, therefore the discretion is not absolute. [Reference was made to *Swan Hill Corporation* v. *Bradbury*.[22]] The discretion to grant a licence would cover the refusal of a licence simply to prevent competition with the railways. At the very lowest the discretion is not confined to a mere matter of regulation of inter-State trade. The regulation in *Australian National Airways Pty. Ld.* v. *The Commonwealth*,[23] which enabled a licence to be granted or refused at discretion, was held invalid as infringing section 92. That case, in which the statute was similar to the present, reinforces the view that prohibition which may be relaxed at discretion remains a prohibition. The present Act may be summed up in this way: it imposes a prohibition on engaging or attempting to engage in trade, commerce and intercourse, including inter-State commerce, with a motor-vehicle, including by definition an aircraft, without a licence. No conditions are laid down on the performance of which a licence must issue. So there is no right given to the licence. The grant or refusal of a licence or the imposition of terms and conditions therein is in the absolute discretion of the board. The grant or refusal may be used merely to disclaim or prohibit competition with the railways or to implement any policy of the Government in the interest of the State. In particular, the grant or refusal of the licence cannot be confined to regulatory considerations which would lead to traffic safety or orderliness. Thus the Act imposes a simple prohibition on the carrier's inter-State movement in commerce. The arbitrary power to relax the prohibition leaves it still a simple prohibition. This Act denies the exercise of the right to engage in inter-State trade and attempts to turn that right into a privilege to be granted at the Government's pleasure. Whether or not this privilege is granted depends entirely on the policy of the State.

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[17] 50 C.L.R. 30.

[18] [1936] A.C. 578.

[19] [1950] A.C. 235.

[20] (1935) 52 C.L.R. 157, 168–88.

[21] (1916) 22 C.L.R. 556, 602–3.

[22] (1937) 56 C.L.R. 746, 757.

[23] (1945) 71 C.L.R. 29.

With regard to section 3 (2) of the Act—that the Act shall be valid to the extent that it is not in excess of the State's power—from the practical point of view, and applied first to the question of the licence, if this Board were of opinion that the Act could not validly prohibit inter-State commerce use of the vehicle, there are two possibilities: (i) that, looking at section 12, e.g., the Board would say that there is no way of severing by construction those provisions so as to exclude inter-State commerce. That view spells total invalidity. (ii) The other possible view is that the Board is of opinion that the effect of section 3 (2) is to compel a reading of section 12 which does not bring it into collision with section 92, in which event it would in substance interpolate after the word " operates " in section 12, " otherwise than in the course " of or for the purposes of inter-State trade." The following cases show how a section similar to section 3 (2) has been used to try to accommodate a statute to section 92: *Matthews* v. *Chicory Marketing Board (Victoria)*[24]; *Vizzard's* case[25]; *Cam & Sons Pty. Ld.* v. *Chief Secretary of New South Wales.*[26]

Turning now to the first question stated above—whether a prohibition of the commercial use of motor-vehicles except by permission of an official is compatible with freedom to engage in inter-State trade—there are decisions of this Board, and of the High Court of Australia approved in those decisions, which, it is submitted, answer this question in favour of the appellant. Those cases may be summed up in this way: (1) A grower successfully claimed that the grant to a board of a power in its discretion to determine where and in what quantities he could dispose of his produce denied him the guaranteed freedom: *James* v. *South Australia*,[27] approved in *James* v. *Cowan.*[28] (2) A grower successfully claimed that a statute which prevented him or his carrier from carrying his produce inter-State except upon licence infringed the guaranteed freedom: *James* v. *The Commonwealth.*[29] (3) A woman successfully claimed in wartime that a regulation which forbade her to travel inter-State except by permission of an official

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[24] (1938) 60 C.L.R. 263, 270, 283.

[25] 50 C.L.R. 30, 56.

[26] (1951) 84 C.L.R. 442, 454–6.

[27] (1927) 40 C.L.R. 1.

[28] [1932] A.C. 542, 555.

[29] [1936] A.C. 578.

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denied her that freedom of intercourse which section 92 guarantees: *Gratwick* v. *Johnson*,[30] which was approved in, and formed the basis of, the *Airways* case,[31] which in turn was specifically approved by this Board in the *Bank* case.[32] (4) A carrier by air successfully claimed that a regulation which gave an official a discretion to refuse him a licence and otherwise prohibited the use of the airplane in commerce was invalid as again infringing the guaranteed freedom: the *Airways* case.[33] (5) And lastly, the *Bank* case,[34] in which a banker successfully claimed that the grant of a power to a Minister to prohibit the further carrying on of the banker's business, which extended inter-State, denied him the guaranteed freedom: the *Bank* case.[34]

All those individuals successfully asserted their right to engage in the trade, and this Board, not in terms, but in principle, denied the power of the governments to convert that right into a mere privilege. In the course of the cases it was decided that a carrier himself was engaged in inter-State trade. There can be no distinction between the present case and those cases, when here there is a carrier by land who is told that he cannot use his vehicle commercially except by permission of an official. There is here no disability personal to the appellant. *W. & A. McArthur Ld.* v. *State of Queensland*[35] decided that section 92 did not bind the Commonwealth; *James* v. *The Commonwealth*[36] decided expressly that it did. The question here is whether the Act in question operates so as to impair the freedom of inter-State trade. In the draft convention which preceded the framing of the Constitution the phrase was used, "free from the payment of "customs duties and from all restrictions whatsoever except "such regulations as may be necessary for the conduct of the "business." That view in relation to regulations is adopted. See also *Duncan* v. *State of Queensland*.[37]

The following authorities were then examined in detail: *James* v. *South Australia*[38]; *James* v. *Cowan*[39]; *James* v. *The Commonwealth*[40]; *W. & A. McArthur* v. *State of Queensland*[41]; *Ex parte Nelson*[42]; *Peanut Board* v. *Rockhampton Harbour Board*[43] and the *Bank* case.[44] *James* v. *The Commonwealth*[45] was an express

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[30] (1945) 70 C.L.R. 1.
[31] 71 C.L.R. 29.
[32] [1950] A.C. 235, 310–11.
[33] 71 C.L.R. 29.
[34] [1950] A.C. 235.
[35] (1920) 28 C.L.R. 530.
[36] [1936] A.C. 578.
[37] 22 C.L.R. 556, 592.
[38] 40 C.L.R. 1.
[39] 43 C.L.R. 386; [1932] A.C. 542.
[40] [1936] A.C. 578.
[41] 28 C.L.R. 530.
[42] (1928) 42 C.L.R. 209, 218.
[43] (1933) 48 C.L.R. 266.
[44] [1950] A.C. 235.
[45] [1936] A.C. 578.

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decision that a licensing scheme for carriage inter-State necessarily infringed section 92—that a Commonwealth Act which prohibited delivery of goods inter-State without a licence infringed section 92. With respect, when the expression "as at the border" was used in that case, there still remained the question, freedom from what laws? In the *Bank* case [46] the Board said that the question was to be decided by ascertaining the operation of the Act—find out what the Act does, don't trouble about supposed motives of the legislature. The dictum that one cannot turn a constitutional right into a privilege is from *Howard* v. *Illinois Central Railroad Co.*[47]

The purpose in reading the *Bank* case [48] and the other cases before the Board is to support three propositions which, it is submitted, in point of principle warrant a conclusion that section 12 of the present Act cannot apply to the appellant: (1) The freedom guaranteed is the freedom of individuals to participate in inter-State trade and commerce. (2) Whilst the inter-State activities of individuals in commerce may be regulated, neither simple prohibition nor exclusion of competition can be regarded as regulation of such activities. (3) The exclusion of individuals by reason of personal incapacity or unfitness to engage in such activities may be regulatory of those various activities. Every argument advanced in the transport cases has been displaced by the judgments of the Board. The grounds on which the transport cases have been displaced are: (1) That the validity of a statute has to be determined by its operation; that is to say, its legal effect on inter-State commerce, and not by the existence or absence of some supposed ulterior motive or purpose hostile to inter-State commerce. (2) That the fact that the law may leave the total flow of inter-State commerce unimpaired is irrelevant to the question of validity. Those two propositions are established by the *Bank* case [48]; the contrary of both propositions is to be found in support of the transport cases. (3) That the carrier is himself engaged in a trade of his own, and is not merely an accessory to the trade of those whose goods he carries. The transport cases were decided on the view that the carrier was not himself a trader. It is submitted that there is in reality a majority of opinion in the High Court in the present case for the proposition that on principle this Act offends section 92. "Regulation" may be defined as the making of rules by which people who are by hypothesis free to carry on trade are enabled to do so.

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[46] [1950] A.C. 235.

[47] (1908) 207 U.S. 463, 502–3.

[48] [1950] A.C. 235.

With regard to the levy, there is respectively under sections 18 (5) and 37 of the Act a power given, where a licence is granted, to impose a condition of payment of a sum, and the power to impose a payment of a sum where a vehicle is operated without a licence. The levy is in addition to, and quite distinct from, the registration fee payable on the registration of the vehicle, and in addition to the licence fee. It is a sum which is levied, it is submitted, on the movement in commerce inter-State of the vehicle. It is a tax. It has never been doubted that a tax on inter-State trade is a burden on inter-State commerce: *Matthews* v. *Chicory Marketing Board (Victoria).*[49] The amount of the levy is subject to a statutory maximum, but that is not relevant to its nature. On the point that an inter-State transaction may not be taxed, see *The Commonwealth and Commonwealth Oil Refineries Ld.* v. *South Australia*[50] and *James* v. *The Commonwealth.*[51] Further, this levy is not in the nature of a toll. At common law, and apart from statute, a toll can only be granted by the Crown in exchange for consideration. In principle this levy is a tax, and it is discriminatory taxation; it is a power to tax very movement itself; and tax cannot be regarded as regulatory.

The transport cases (supra) were then examined in detail. The first was *Willard* v. *Rawson.*[52] From *Vizzard's* case[53] these views are submitted: (1) The various grounds taken by the judges who formed the majority in *Vizzard's* case have all been displaced by the judgments of this Board. Indeed, the reasons taken were inconsistent with *James* v. *Cowan*[54] at the time. (2) In particular, the Board in *James* v. *The Commonwealth*[55] did not approve the decision in *Vizzard's* case.[56] (3) The Board did not express an opinion in the *Bank* case[57] that *James* v. *Cowan*[58] and *Vizzard's* case[59] were reconcilable. (4) The Act, section 12, cannot be regarded as regulatory of the activities of individuals in inter-State commerce. Simple prohibition is not regulation: *Municipal Corporation of City of Toronto* v. *Virgo*[60]; *Attorney-General for Ontario* v. *Attorney-General for the Dominion*[61]; *Melbourne Corporation* v. *Barry*[62]; *County Roads Board* v. *Neale Ads Pty. Ld.*[63]; *Swan Hill Corporation* v. *Bradbury.*[64] The next transport cases were *Bessell* v. *Dayman*,[65] *O. Gilpin Ld.* v. *Commissioner of Road Transport*[66] and *Duncan and Green Star Trading Co.* v. *Vizzard*.[67] Those transport cases were before the Board's judgment in *James* v. *The Commonwealth*,[68] and then came *Riverina Transport Pty. Ld.* v. *Victoria*,[69] which was after *James'* case[70] but before the *Bank* case.[71] In between the *James* and the *Bank* cases came *Gratwick* v. *Johnson*[72] and *Australian National Airways Ld.* v. *Commonwealth*.[73] Then, lastly, came *McCarter* v. *Brodie*,[74] decided after the *Bank* case[75] and before the present case.

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[49] (1938) 60 C.L.R. 263, 276.
[50] (1926) 38 C.L.R. 408.
[51] [1936] A.C. 578, 623–4.
[52] 48 C.L.R. 316.
[53] 50 C.L.R. 30.
[54] [1932] A.C. 542.
[55] [1936] A.C. 578.
[56] 50 C.L.R. 30.
[57] [1950] A.C. 235.
[58] [1932] A.C. 542.
[59] 50 C.L.R. 30.
[60] [1896] A.C. 88, 93; 12 T.L.R. 46.
[61] [1896] A.C. 348, 365; 12 T.L.R. 388.
[62] (1922) 31 C.L.R. 174, 188–208.
[63] (1930) 43 C.L.R. 126, 139.
[64] 56 C.L.R. 746, 752–73.

Summarizing, in conclusion: (1) The freedom is the freedom of individuals to engage in inter-State activities of commerce or travel. (2) The only laws which may be made to bear directly, as distinct from consequentially, on such activities are such laws as merely regulate such activities—individual activities in inter-State commerce. (3) Section 12 of the Act forbids *any* person to engage in the particular commercial activity of transportation, inter alia, inter-State. It is thus a prohibition against individuals engaging in that inter-State capacity. (4) The power to relax that prohibition is no more than a power, there is no duty, and the power is discretionary. (5) Further, the power to relax the prohibition is wide enough to permit of discrimination by the preference of intra-State over inter-State trade, or by the preference of one form of transport over another, thus disclaiming competition. (6) Further still, the power to relax the prohibition is wide enough to permit the imposition of a tax upon the actual commerce movement inter-State. It is submitted that *James* v. *Cowan*[76] in its approval of *James* v. *South Australia*[77] requires the conclusion that section 12, and therefore sections 14, 17, 18 and 37 of the Act, cannot apply to inter-State transportation. The present case is a fortiori *James* v. *Cowan*.[78] It may be added that both *James* v. *The Commonwealth*[79] in its actual decision, and the reasoning in the *Bank* case,[80] and particularly its specific approval of the *Airways* case,[81] inevitably lead to the same conclusion.

[65] 52 C.L.R. 215.
[66] 52 C.L.R. 189.
[67] 53 C.L.R. 493.
[68] [1936] A.C. 578.
[69] 57 C.L.R. 327.
[70] [1936] A.C. 578.
[71] [1950] A.C. 235.
[72] 70 C.L.R. 1.
[73] 71 C.L.R. 29.
[74] 80 C.L.R. 432.
[75] [1950] A.C. 235.
[76] [1932] A.C. 542.
[77] 40 C.L.R. 1.
[78] [1932] A.C. 542.
[79] [1936] A.C. 578.
[80] [1950] A.C. 235.
[81] 71 C.L.R. 29.

It is submitted that the transport cases were inconsistent with *James* v. *Cowan*[82] when decided; that their bases have been swept away by the subsequent decision of the High Court in the *Airways* case[83] and by the decisions of the Board in *James* v. *The Commonwealth*[84] and the *Bank* case[85]; and that the cases were not at any time approved by decisions of the Board, nor were they at any time held to be consistent with *James* v. *Cowan*.[86]

Further subsidiary submissions are: (1) A power which enables discrimination against an inter-State activity necessarily offends section 92. (2) A power which imposes a tax as distinct from a mere recompense for services rendered upon an inter-State transaction necessarily offends section 92. (3) Neither the Act nor the specific sections mentioned above can be regarded as regulatory of the activities of individuals in inter-State transportation. The prohibition contained in section 12 remains a simple prohibition within the meaning of the judgment in the *Bank* case,[87] and the appellant is entitled to a declaration that in relation to its inter-State carrying activities, and to its vehicles whilst employed therein, the Act is inoperative, or at any rate, sections 12, 13, 14, 15, 16, 17, 18, 28, 29 and 37 are so inoperative. If, by the use of the reading-down section, the provisions in question can be so confined in their construction or in their operation that they do not impair or authorize the impairment of the guaranteed freedom, they will be valid as so construed or confined, but inapplicable to the inter-State activities which they would otherwise have affected.

M. F. Hardie Q.C. (Australia), *Frank Gahan Q.C.*, *Else Mitchell* (Australia) and *J. G. Le Quesne* for the respondents. With regard to the application of the principle of stare decisis here, the first material challenge to any transport legislation in Australia was made in *Vizzard's* case[88] in 1933. The legislation was held to be valid, and the judges referred to the very wide discretion which the board had in the matter of granting licences. The second challenge in New South Wales was made in *Gilpin's* case,[89] in 1935, and in that case the validity of provisions of the Act conferring the right to impose a mileage charge was attacked, and they were held valid. The next case was *Bessell's* case,[90] also in 1935, on a South Australian Act very similar in form to

[82] [1932] A.C. 542.
[83] 71 C.L.R. 29.
[84] [1936] A.C. 578.
[85] [1950] A.C. 235.
[86] [1932] A.C. 542.
[87] [1950] A.C. 235.
[88] 50 C.L.R. 30.
[89] 52 C.L.R. 189.
[90] 52 C.L.R. 215.

the present Act, and again it was held to be valid, and the High Court applied *Vizzard's* case [91] and *Gilpin's* case.[92] The next challenge to transport legislation was in *Duncan's* case [93]—the third in which the New South Wales legislation was challenged in the High Court—and again it was held that there was no infringement of section 92. Applications were made to this Board both in *Gilpin's* case [94] and *Duncan's* case [95] for special leave to appeal, and both were refused. On this question of stare decisis it is submitted that that refusal was a fairly definite indication that this Board regarded those decisions as being right. It was reasonable for the State from that date onwards to assume that litigation on this matter had ended once and for all, and that it could proceed to base its financial and economic policies on the footing that there would be no further disturbance or uncertainty in that branch of the law. It was reasonable and proper for the State of New South Wales to embark upon a programme of road legislation on the assumption that it had full constitutional power to legislate in relation to those roads.

Further, the State was justified in drawing an inference from *James* v. *The Commonwealth* [96] that the litigation on this matter was at an end; the language in that case is used to support this argument. The Board said that they approved the transport cases, or, alternatively, used language which was reasonably capable of that construction and was so construed by the judges of the High Court. Passages in that case are an indication to litigants of New South Wales that this matter was finally set at rest. Again, and still on this stare decisis point, there was no doubt in the minds of the judges in the *Riverina* case [97] that they thought that this Board had decided this matter once and for all. On the various judgments in the States of Australia, particularly in New South Wales, the State was entitled to consider, and apparently did consider, that the validity of the State Transport (Co-ordination) Act had been for all time finally settled, not only by the High Court but by a decision of this Board.

Between the decision in *James* v. *The Commonwealth* [98] and the *Bank* case [99] two cases were heard which had some relationship to the transport cases: *Gratwick* v. *Johnson* [100] and the *Airways* case.[101] They were decided on the footing that the land transport

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[91] 50 C.L.R. 30.
[92] 52 C.L.R. 189.
[93] 53 C.L.R. 493.
[94] 52 C.L.R. 189.
[95] 53 C.L.R. 493.
[96] [1936] A.C. 578.
[97] 57 C.L.R. 327.
[98] [1936] A.C. 578.
[99] [1950] A.C. 235.
[100] 70 C.L.R. 1.
[101] 71 C.L.R. 29.

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cases had been correctly decided. There was no challenge made from 1936 to 1950 to any of the States' legislation modelled on the Act of New South Wales held to be valid to 1935. The first occasion when the matter arose after the judgment in the *Bank* case[102] was in *McCarter* v. *Brodie.*[103] On the application of the principle of stare decisis reliance is also placed on *Attorney-General for Ontario* v. *Canada Temperance Federation.*[104] The penalty section of this present legislation has been put into operation over the years, and a decision given now, 20 years after the Act was passed, that it was invalid would have a somewhat disturbing effect on the mind of the community in the matter of the observance of revenue laws. [Reference was also made to *W. & A. McArthur Ld.* v. *State of Queensland*[105] and *Australian Agricultural Co.* v. *Federated Engine-Drivers and Firemen's Association of Australasia.*[106]] The last-cited case has been used to support the view that the principle of stare decisis is not applicable in constitutional cases; but it is not conceded that there is anything in it destructive of the present argument.

The next point is that the decision of the High Court is correct on a proper understanding and application of the two tests enunciated in the *Bank* case,[107] namely, (1) that regulation of trade, commerce and intercourse among the States is compatible with its absolute freedom; and (2) that section 92 is violated only when a legislative or executive act operates to restrict such trade, commerce and intercourse directly and immediately as distinct from creating some indirect or consequential impediment which may fairly be regarded as remote. The origin of those tests in the *Bank* case[107] is *Home Benefits Pty. Ld.* v. *Crafter*[108] and *Milk Board (N.S.W.)* v. *Metropolitan Cream Pty. Ld.*[109] The present Act imposed a regulation and not a simple prohibition. It is important to note that Latham C.J., when formulating the "regulation" test in the *Milk Board* case,[109] had in mind the transport legislation of New South Wales; he expressed the view that the transport cases fell into the class of permissive regulation. See also *Gratwick* v. *Johnson*[110] and what Latham C.J. said on the same topic in the *Airways* case.[111] Latham C.J. in four cases from 1939 to 1945 extracted from *James* v. *The Commonwealth*[112] this principle as to regulation that is stated in precisely the same form in the various cases. It might be described as the connecting link between *James* v. *The Commonwealth*[112] and the *Bank* case.[113] [On the regulatory test the *Bank* case[113] and *McCarter* v. *Brodie*[114] were also examined, and on the history of the "direct and indirect" test reference was made to *James* v. *Cowan*,[115] the *Peanut Board* case,[116] *Willard* v. *Rawson*,[117] *Vizzard's* case[118] and *Tasmania* v. *Victoria*.[119]] The respondents base their case primarily on the application of the regulatory test, but in those early transport cases Rich J. held that the transport legislation was good on the direct and indirect test, and the respondents are concerned to uphold that view as well.

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[102] [1950] A.C. 235.

[103] 80 C.L.R. 432.

[104] [1946] A.C. 193, 206; 62 T.L.R. 199.

[105] 28 C.L.R. 530, 556.

[106] (1913) 17 C.L.R. 261, 274–5.

[107] [1950] A.C. 235, 310.

[108] (1939) 61 C.L.R. 701, 711–12.

[109] (1939) 62 C.L.R. 116, 126.

[110] 70 C.L.R. 1, 13.

[111] 71 C.L.R. 29, 61.

[112] [1936] A.C. 578.

It is submitted that the following propositions can be extracted from the judgment in the *Bank* case[120] in relation to the regulatory test: (1) A consideration of the pith and substance of the law or its general character or subject-matter is relevant (p. 312). (2) Regulation is used as the antithesis of both (i) a law imposing a simple prohibition, and (ii) a law which is directed against inter-State trade (pp. 302–3). (3) Considerations of reasonableness and practicability are relevant (p. 311). (4) Regulation may involve prohibition even to the extent of monopoly (p. 311). (5) The problem is a legal one which has a number of political, social and economic aspects (p. 310). Another group of submissions which, it is submitted, are also maintainable on the *Bank* case[120] are: (1) The freedom guaranteed by section 92, although attaching to individuals, does not entitle an individual to ignore a regulatory law. In other words, section 92 confers upon the individual a right to ignore only legislation which offends against section 92. (2) A regulatory law may be a law which deals with or affects inter-State trade exclusively, e.g., under section 51 (1) of the Constitution; or which deals with or affects such trade in common with or as part of a trade. (3) The regulatory character of a law is to be determined by setting the law against the economic, social and political background of the trade and not by considering solely whether it is regulatory of the plaintiff's trade. (4) A regulatory law may prohibit, or may provide an administrative system for prohibiting, some individuals from engaging in the trade, and may restrict, or may provide an administrative system for restricting, the number of individuals who are to engage in the trade. The prohibition or restriction need not be limited to facts and circumstances relevant to the capacity or suitability of that individual for the trade. (5) The criteria or means selected to prohibit individuals or to restrict the numbers should be reasonable and practicable, and their choice must be largely a matter of legislative discretion. (6) Given that there should be a limitation on the number of individuals in a trade, the only reasonable and practical way of achieving that result will in certain cases be by a licensing system administered in accordance with principles laid down by the legislature. (7) When the trade is, or has the characteristics of, a public utility, and the needs of the public are likely to vary from time to time and from place to place, the licensing authority can be given a wide discretion if only to permit of flexibility of administration. That is particularly relevant to the transport problem in the various States of the Commonwealth.

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[112] [1936] A.C. 578.
[113] [1950] A.C. 235.
[114] 80 C.L.R. 432.
[115] [1932] A.C. 542.
[116] 48 C.L.R. 266.
[117] 48 C.L.R. 316.
[118] 50 C.L.R. 30.
[119] 52 C.L.R. 157, 172.
[120] [1950] A.C. 235.

Accordingly the respondents submit that regard properly can and should be had to: (a) the existence of competing transport facilities by rail and road; (b) the facts that the railway systems in Australia are now and before federation were State-owned, and that vast sums of public money are invested in such systems; (c) the fact that the State railway systems are conducted not as profit-making enterprises but for the convenience of the public and the development of the States; (d) the fact that the roads are constructed and maintained by public authorities of the States from revenue raised by various forms of taxation and grants of public moneys by the States and the Commonwealth; (e) the increase in road transport as a competitor with the railways and its impact on the earning capacity of the State-owned railways; (f) the special position of railways under sections 98, 102 and 104 of the Constitution, discussed by Latham C.J. in the *Riverina* case[121]; and (g) the existence of common State policies with respect to the road and railway systems. So far as these are matters of fact, they are matters of common knowledge of which the High Court has from time to time taken judicial notice. References to the social, economic and political aspects of the matter are to be found in *Vizzard's* case[122] and *McCarter* v. *Brodie*.[123]

The matter of conferring on an official of an administrative authority a wide discretion in licensing public vehicles was nothing new when the Act was passed in 1931. It has existed in New

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[121] 57 C.L.R. 327, 346–56.

[122] 50 C.L.R. 30, 82–3.

[123] 80 C.L.R. 432, 456.

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South Wales since the Local Government Act of 1919, and if it is bad in the Transport Act of 1931 it would appear to be bad on a similar line of reasoning in the Act of 1919. That shows the implication of holding now that a section such as that now in question is bad; and that is the importance of the seventh of the above propositions. Public interest must be taken into account in administering any system of the regulation and control of public motor-vehicles.

The next head of argument is a consideration of *James* v. *South Australia*[124]—great reliance was placed on that case by the appellant. It is submitted that it does not support the appellant's contention that in the instant case the State Transport Act should be held to be bad; the actual decision in that case cannot help on the present problem at all. It is not conceded that the same sort of principles apply to transport legislation as to marketing legislation; they can be put in a different category. It was said for the appellant that the view in *James* v. *Cowen*[125] of *James* v. *South Australia*[126] is fatal to the respondents' case, and a similar argument was based on *James* v. *The Commonwealth.*[127] It is submitted that what was said in the *Bank* case[128] is not a complete or adequate statement of the effect of the decision in *James* v. *South Australia*[129] for the purpose of deciding the validity of the Transport Act in the instant case.

With regard to section 3 (2) of the Act—that the Act should be valid to the extent to which it is not in excess of the power—that provision has the same effect as the introductory words in section 28 of the South Australian Dried Fruits Act, with this result, it is submitted, by analogy, that the proper approach to a problem such as has arisen in the present case is not so much an examination of the Act as an examination of the validity of the administrative steps taken under the Act. If that be right, then the real question in the present case is the validity of the mileage charge which the respondents have imposed on the appellant: it was pressed on the High Court that that was the only issue in this case. It is the only real point of contention between the appellant and the authorities administering the State Act. If this Board were to say that the obligation to pay mileage charges is the only issue between the parties, this case could be decided on the principle applied in *Wilcox Mofflin Ld.* v. *State of New*

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[124] 40 C.L.R. 1.
[125] [1932] A.C. 542.
[126] 40 C.L.R. 1.
[127] [1936] A.C. 578, 607–8, 633.
[128] [1950] A.C. 235, 303.
[129] 40 C.L.R. 1.

South Wales[130]: the High Court said that they were not going to strike out a power which might be contrary to section 92. The proper approach is to wait and see how the power is exercised.

The next matter relates to the attack by counsel for the appellant on the decision in *Vizzard's* case.[131] He indicated three alleged fallacies which he said were crucial to the decision in that case: (1) That the Act is not invalid under section 92 unless there exists some step, ulterior motive or purpose hostile to the interest of commerce; (2) the law may leave the total flow of inter-State commerce unimpaired; (3) the principle that the carrier is not himself engaged in trade, but is merely an accessory to the trade of those whose goods he carries. It is submitted that Evatt J.'s judgment sets out the real principle of the ratio decidendi of *Vizzard's* case,[131] and that the reference there to hostile action was referring to action which struck at, or was directed against, inter-State trade. The contention regarding the totality of trade is answered by *McCarter* v. *Brodie*.[132] The judgment in *Vizzard's* case [133] is not necessarily based on the view that the carrier is not himself engaged in a trade of his own. The minority view in *Vizzard's* case [133] is based on the second limb of the decision in *McArthur's* case [134]—that the State is bound by section 92. [Reference was also made to *Willard* v. *Rawson*.[135]]

Next, an examination of the judgments of the High Court given in cases between the dates of *James* v. *The Commonwealth* [136] and the *Bank* case,[137] which the appellant submitted destroyed the land transport cases, shows that they are distinguishable and that they proceeded on the basis that the land transport cases had been correctly decided and had become firmly embedded in the Constitution of Australia. There is nothing in *Gratwick* v. *Johnson* [138] which is destructive of the decisions in the land transport cases; it was a simple bare prohibition; it did not regulate anything. There is a big difference between a bare prohibition and a licensing system such as there is under the Transport Co-ordination Act. The *Airways* case [139] was also one of a bare prohibition. It is submitted that the approach in the *Airways* case [139] and the *Bank* case [140] in respect of such an Act as the present is not the right one, and that one must look at it as a whole. So regarded, the present Act can be considered a reasonable method of regulating the matters with which it deals.

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[130] (1952) 85 C.L.R. 488, 493, 520.
[131] 50 C.L.R. 30, 92–4.
[132] 80 C.L.R. 432, 451.
[133] 50 C.L.R. 30, 80.
[134] 28 C.L.R. 530, 554.
[135] 48 C.L.R. 316, 330.
[136] [1936] A.C. 578.
[137] [1950] A.C. 235.
[138] 70 C.L.R. 1.
[139] 71 C.L.R. 29.
[140] [1950] A.C. 235.

Next, there are certain judgments of the High Court which, it is submitted, will have to be overturned completely if the Board are disposed to accept the appellant's argument: *Ex parte Nelson* [141]; *Hartley* v. *Walsh* [142]; the *Milk Board* case [143]—if the appellant's submissions are accepted the last-cited case would go by the board and the whole statutory basis of distribution of milk between two and three million people would be destroyed—and *Andrews* v. *Howell* [144]—a decision of importance, as it was the basis of all the wartime legislation expropriating property during the war.

The next point is that if section 92 is concerned solely with the position and protection of individuals, there is in a strict view of the matter no justification for any prohibition. On that view every individual must be free to participate in inter-State trade. Nobody, it would seem, has in fact contended for such an extreme view. Both on authority and according to the appellant's argument prohibition of individual participation is permitted in some circumstances. The appellant sought to keep this concession to very narrow limits—he moved rather unwillingly from that limited area. In the *Bank* case [145] it was said that it was legitimate to regulate inter-State trade, and this, it is submitted, means that there must be some prohibition, for prohibition must always be the ultimate sanction of a regulation. The important statement on this branch of the case is in the *Bank* case [146]—that in some circumstances a law excluding all individuals from a certain department or section of inter-State trade may yet be a valid regulatory law. It would appear from what was said in that judgment that so extreme a case would not be justified in presently existing circumstances; but the important thing is the recognition of the possibility, which, it is submitted, involves certain consequences: (1) That in the last resort it is the trade which is to be preserved rather than the individual's right to participate in it. (2) There cannot be only two possible positions, namely, the exclusion of all individuals or the exclusion of none. There must be intermediate positions, that is, the exclusion of some individuals. (3) Sheer necessity is not the only thing which would justify the exclusion of all individuals. The exclusion of all individuals is justified not when it is the only way of preserving the trade, but when it is the only reasonable and practical way in which to preserve it. (4) It is a question of fact in each case whether the legislation which is attacked embodies a reasonable and practical method of excluding individuals. The really important matter to look at in applying these principles is what is the trade or activity which is being regulated.

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[141] (1928) 42 C.L.R. 209, 217.

[142] (1937) 57 C.L.R. 372.

[143] 62 C.L.R. 116.

[144] (1941) 65 C.L.R. 255.

[145] [1950] A.C. 235.

[146] Ibid. 311, 312.

The *Bank* case judgment [146] states that regulation of trade "clearly"—that is stressed—may take the form of excluding from inter-State trade persons who are unfit to participate in the trade. That is not exhaustive, and therefore, it is submitted, persons may be excluded by reason of considerations other than personal unfitness. The judgment did not formulate any test to apply in determining the validity of a law which provides for or contemplates the exclusion by reason of circumstances other than some mere personal unfitness of some but not all of the individuals who may desire to engage in the trade. The judgment states certain principles which are, however, of assistance in determining that question: (1) Each case is to be judged on its own facts and in its own setting in time and circumstances. (2) Regulation is the antithesis of (a) simple prohibition, and (b) a law directed against inter-State trade. (3) A regulatory law includes one prescribing rules as to the manner in which trade is to be conducted. (4) The problem, though a legal one, involves considerations of a political, social and economic nature. (5) The pith and substance of the law or its general character and subject-matter is relevant to the question whether a law which provides for or contemplates the exclusion of some but not all is valid legislation.

The general submission in respect of the decisions in the transport cases is that, having regard to the principles stated above, the test of the validity of the transport cases adopted in the majority judgments in *Vizzard's* case,[147] in *McCarter* v. *Brodie* [148] and in the present case is the correct one, i.e., to examine the Act as a whole against the economic, social and political background of the transport industry, including the provision and ownership by the State of the roads and railways, and then to decide whether or not its character, purpose and effect are truly regulatory. The judgments in question proceed on the footing that a licensing system such as that embodied in the Act is the only reasonable and practical method of regulating the public transport system in New South Wales. With regard to the vesting of discretionary powers in an administrative officer, see

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[146] [1950] A.C. 235, 311, 312.

[147] 50 C.L.R. 30.

[148] 80 C.L.R. 432.

McCarter v. *Brodie* [149] and *Shrimpton* v. *The Commonwealth.*[150] [On the question whether the transport cases can be logically confined to the area in which Dixon C.J. put them in the present case, reference was made to *Hospital Provident Fund Pty. Ld.* v. *State of Victoria.*[151]]

Coming now to the crucial issue in this matter, the mileage charges, this is the only real, live and important issue to the parties to this litigation; that is, whether the mileage charges which have been imposed pursuant to section 18 on the appellant company are valid. The submission is that this mileage charge is part and parcel of the co-ordination machinery established by the Act. The authorities are to use the licensing powers for the purpose of effecting a co-ordination of transport. *Gilpin's* case [152] is the only High Court decision directly on this point. The appellant contended that inter-State trade cannot be taxed. Sections 51 (ii), 55, 86, 93 (1), 96, 99, 107, 112, 114 and 117 of the Constitution are the provisions relating to taxation, and the sections of the Constitution which restrict or limit the States' power of taxation are 90, 114 and 117. The crucial question is: what taxation or revenue laws are forbidden to the States by section 92? and it is important to bear in mind that section 92 applies equally to the States and the Commonwealth. It is submitted that the only effect of section 92 on the powers of the State and Federal Parliaments in the matter of taxation is to forbid in effect customs duties payable at the border, or the imposing of any tax on goods because they are intended to go, or have gone, over the border. The authorities on this point are very few: *Fox* v. *Robbins.*[153] The tests in the *Bank* case [154] are completely inadequate and inappropriate for determining the validity of revenue laws under section 92. The tests laid down in *James* v. *Cowan* [155] and *James* v. *The Commonwealth* [156] are the proper tests to apply in relation to revenue laws, and the relevant test is, are the goods taxed at the border, or because they are going over the border?

This mileage charge is a tax on persons in New South Wales for the use of the roads by them in that State. The licence fee is a tax which the respondents could validly impose; there is no difference in principle between that charge or tax and a tax which is imposed in the form of a mileage charge. The liability is incurred as and when the vehicle moves along the roads. The argument is put in two ways: (a) this mileage charge is valid as part of the licensing system in this Act, and (b) alternatively, in any event, the mileage charges would be justified apart altogether from a licensing system in that they represent a legitimate exercise of the State's power to tax, because it is taxing a subject-matter in New South Wales, or imposing no tax in contravention of section 92. The validity of the mileage charge is established by the authorities.

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[149] 80 C.L.R. 432, 461.
[150] (1945) 69 C.L.R. 613, 618–9.
[151] (1953) 87 C.L.R. 1, 27.
[152] 52 C.L.R. 189.
[153] (1909) 8 C.L.R. 115, 128, 130.
[154] [1950] A.C. 235.
[155] [1932] A.C. 542.
[156] [1936] A.C. 578.

To summarize the submissions relative to the mileage charges: (1) These provisions are regulatory in character as being part of and ancillary to a State-wide system for co-ordination of transport which is itself regulatory. (2) The charges imposed apply to all vehicles engaged in trade on the roads of New South Wales (according to the distance travelled on such roads) without regard to the fact that some of such vehicles may have crossed or may propose to cross State borders. (3) In so far as the charges imposed may constitute a financial burden on the owners of vehicles used on inter-State journeys, the effect of such burden on inter-State trade is only indirect and consequential. (4) The charges are the same as those upheld in *Gilpin's* case.[157] The respondents concede that the imposition of charges in respect of vehicles used on inter-State journeys would infringe section 92 if the charges (a) discriminated against inter-State road transport or vehicles engaged therein; (*b*) were imposed at such a rate as to be prohibitive of inter-State road transport, whether alone or in common with all road transport. However, section 18 (5) provides for a maximum which is not alleged to be prohibitive of inter-State road transport, and section 3 (2) prevents section 18 (5) being construed as authorizing the imposition of charges which would be invalid on either of the above grounds.

The transport cases are firmly embedded in the Australian Constitution, and if the Board think it necessary or desirable to overrule them because they do not fit in with the general reasoning in relation to section 92, then it is submitted that it would be necessary to go back to some point of time earlier than 1933, when *Vizzard's* case [158] was decided, to see whether the law as to section 92 has become more and more confused as the years have gone by as the result of an original wrong approach to the problems under the section.

The respondents are satisfied to take the test in *James* v. *The*

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[157] 52 C.L.R. 189.

[158] 50 C.L.R. 30.

Commonwealth.[159] It is possible to give some effect to the words "absolutely free" if one confines the prohibition to some narrow limit, such as "at the border." If that view is adopted one does not get into the unsatisfactory argument as to what is regulation and what is not. There is the simple question involved of whether there has been any interference with a person who wants to cross the border. It shall be absolutely free in the sense that there shall be no customs duties between the States. *James* v. *The Commonwealth*[159] and *James* v. *Cowan*[160] can stand on that approach to the section. The error was made when the High Court decided the *Airways* case.[161] It is late in the day for that submission to be made; but on the other hand, it is late in the day for the Board to be asked to overturn the transport cases. This appeal should be dismissed.

Frank Gahan Q.C. following. With regard to the stare decisis point, there is a very strong current of authority which supports the transport cases. There are only two reasons for the refusal of leave to appeal in *Gilpin's* case[162] and *Duncan's* case,[163] either the Board thought that the decisions were right, or they thought that there was not sufficient doubt of their rightness to justify leave. For the rules applicable in guiding the Board when a petition is brought for special leave to appeal, see *Daily Telegraph Newspaper Co.* v. *McLaughlin.*[164]

James v. *The Commonwealth*[165] was an approval of the transport cases. After that case came the *Riverina* case,[166] which did not come to this Board; it was decided on the basis of the transport cases having been accepted as good. Then came the *Bank* case[167]; the Board said that section 74 of the Constitution barred the right of appeal here, and then went on to say that *Vizzard's* case[168] was rightly decided, but that all Evatt J.'s judgment in that case must not be taken as accepted. If the Board had thought that the transport cases were wrong, they would have said so. There has been a number of cases since the *Bank* case,[169] *McCarter* v. *Brodie*[170] being the only one in which application was made for special leave to appeal. The only possible ground on which such leave could have been refused in that case was because the transport cases were regarded as rightly

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[159] [1936] A.C. 578.
[160] [1932] A.C. 542.
[161] 71 C.L.R. 29.
[162] 52 C.L.R. 189.
[163] 53 C.L.R. 493.
[164] [1904] A.C. 776, 777; 20 T.L.R. 674.
[165] [1936] A.C. 578.
[166] 57 C.L.R. 327.
[167] [1950] A.C. 235.
[168] 50 C.L.R. 30.
[169] [1950] A.C. 235.
[170] 80 C.L.R. 432.

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decided. The reasoning in the argument of Sir Cyril Radcliffe in *Attorney-General for Ontario* v. *Canada Temperance Federation* [171] applies to the transport cases now in question, which, it is submitted, were rightly decided. For the principles applied by the Board, see *In re The Regulation and Control of Aeronautics in Canada.*[172] The words "whether by means of internal carriage "or ocean navigation" in section 92 ought to be given some meaning, and they have not been given any meaning on the view which now prevails. At the very lowest they lend some support to the view that section 92 in its terms is distinguishing between "trade, commerce, and intercourse among the States" and transport as a means of carrying it out.

With regard to how the question of regulation works in relation to State laws, generally speaking, every person and all property within a State are subject to State laws, and therefore the boundary of the State must always be of significance in regard to every law in deciding whether or not a question of property comes within the operation of that law. It is for the legislature of New South Wales to decide what is the best way, or the effective way, of dealing with, e.g., cattle disease in New South Wales, and if they choose what they think is an effective way of dealing with the problem it is perfectly good legislation which is not affected by section 92. That section does not operate to prevent the due execution of any law in a State which is generally regulatory in the State and without any discrimination and without being directed against inter-State trade. If a State makes possession of any article unlawful in the State, that is a perfectly good law; it is for the State to decide, e.g., whether the size of bricks is a suitable subject for regulation and, if so, what form the regulation will take. The whole body of State laws of this general character is outside the operation of section 92. The authorities support that submission. Section 92 was not intended to restrict the sovereignty of the State as regards any law of general application in the State, notwithstanding that it might affect along with persons and goods already in the State persons or goods which were coming into it. [Reference was also made to *Attorney-General for Alberta* v. *Attorney-General for Canada* [173] and *Bank of Toronto* v. *Lambe.*[174]]

P. D. Phillips Q.C. and *C. I. Menhennitt* (both of Australia) for the Commonwealth of Australia, intervener. Nearly a generation ago the Commonwealth intervened in *Vizzard's* case,[175] and it did so because the matter went then, as now, right to the root of the effect of section 92 on the legislative powers of all the Parliaments in Australia. The following fundamental propositions are submitted: (1) The Commonwealth asserts the correctness of the decision in the *Bank* case[176]—that it does prescribe the true operation of section 92—and the real problem is to determine what should be the proper limits of the doctrine which it is submitted led to the correct solution in the *Bank* case[176]; that case illustrates precisely and exactly the salutary operation of section 92. (2) The Commonwealth are not immediately concerned with the validity of this particular State Transport (Co-ordination) Act, but are directly concerned, however, with what this Board might say as to the powers of the Parliaments of Australia, and this Act is an example. They are concerned to argue about the view of the nature of the legislative power which remains notwithstanding section 92. (3) With regard to stare decisis, there are two particular aspects of that phase of the problem. First, that illustrated by the Chief Justice below, who took the view that the transport cases were wrongly decided, but that he ought nevertheless not to disturb them. If this Board comes to that conclusion—that they were wrongly decided—the Commonwealth have no concern to debate the question of stare decisis; from their point of view they will have lost and would have no further interest. It is submitted that they were rightly decided. The second aspect of the problem of stare decisis is that the Board should not say that there is a good deal to be said on both sides and it is very nicely balanced, but that it has been settled in Australia for 21 years and therefore the Board will leave it with its difficulties. This tribunal now faced with the problem should answer it.

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[171] [1946] A.C. 193, 201.

[172] [1932] A.C. 54, 70; 48 T.L.R. 235.

[173] [1939] A.C. 117; 55 T.L.R. 65.

[174] (1887) 12 App.Cas. 575; 3 T.L.R. 742.

Turning now to section 92, the first and major problem is, what effect section 92 has upon substantive legislative powers. The propositions are: (1) Section 92 prescribes freedom for the individual trader to carry on his inter-State trade. The section is concerned with freedom for acts, not goods. It is not concerned with the maintenance of the total flow of inter-State trade. It is not limited to laws discriminating against inter-State trade. The section conditions or invalidates the operation of laws and is not concerned with the motives of legislatures. (2) The freedom of the individual guaranteed by the section is found in a society maintained and ordered by law (i.e., a society consciously and deliberately controlled in the interests of all). (3) A law which simply prohibits an individual from carrying on his inter-State trade, is necessarily inconsistent with the guaranteed freedom. (4) A law which simply prohibits an individual from carrying on his inter-State trade in part (quantitative limitation) is as bad as total prohibition. (5) A society maintained and ordered by law must necessarily retain the right to regulate trade so as to conform with the needs of that society, and in Australia this includes inter-State trade. (6) Section 92 therefore protects the rights of the individual inter-State trader which exist or arise within the inter-State trade as thus regulated. The fact that it is individual rights which are protected provides but little guide in determining the true limits of that regulation which conditions the nature and extent of the individual rights. (7) Regulation of the trade in the interest of an ordered society suggests the continued existence of that entity ("the trade")—hence the invalidity of simple prohibition: but abstract political theory cannot provide a definition of either freedom or regulation. Regulation may certainly embrace the prohibition of modes of trading. (8) Regulation of the trade in the interest of an ordered society may well involve the elimination of individual traders as necessary to the continued existence or proper operation of the trade. (9) This last proposition is obvious in relation to unfit or incapable individuals whose activities may threaten the continued existence or proper operation of the trade. (10) But regulation may for like reasons and in appropriate circumstances involve the elimination of traders themselves under no incapacity as traders and in such circumstances such elimination is not simple prohibition but something more and is constitutionally permissible. (11) Regulation may extend in appropriate circumstances to the elimination of individual inter-State traders themselves under no incapacity (or the prohibition of some parts of inter-State trade) because that elimination (or prohibition) is required by the unmistakable needs of an ordered society which needs precondition the maintenance and operation of inter-State trade. (12) Whilst simple prohibition is forbidden and elimination of competition may in many circumstances be no more than simple prohibition, such elimination of competition may be also something more and be then valid.

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[175] 50 C.L.R. 30.

[176] [1950] A.C. 235.

That puts our view of how section 92 affects the particular exercise of the legislative powers with which this case is concerned, namely, the elimination of individuals. It is important

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to see the way in which the doctrine has developed up to the present stage, and the question arises, are the above principles legitimate deductions, are they workable and practical principles? and if they are, how should they be applied to the instant case? What was the real doctrine of the three decisions of this Board—*James* v. *Cowan*,[177] *James* v. *The Commonwealth*[178] and the *Bank* case[179]—must first be examined to see first whether they establish the 12 principles asserted above—I do not think that they do—and secondly, whether they deny them—they certainly do not. It is at that stage that the real problem begins—to examine whether the assertions set out are in any sense inconsistent with what was there determined. Great error has resulted from trying to find authority in this connexion out of some isolated words or phrases. In *James* v. *Cowan*[180] the Board were in effect saying that if Parliament equips a Minister with power to carry out particular legislative purposes, that if, e.g., he expropriates for purposes of defence against the enemy, or for the prevention of famine, disease and the like, he would not offend section 92, and the purposes of the legislature would be constitutionally valid. If he expropriates for a purpose which is against inter-State trade it would be invalid. On the meaning of "purpose" or "objects," see *James* v. *Cowan*.[181] The total object or purpose of the Act is to be gauged by ascertaining its operative effect in the relevant circumstances. [Reference was also made to *State of New South Wales* v. *The Commonwealth*.[182]]

In the *Bank* case[183] it was said that "pith and substance" is still a relevant test to determine whether a law is regulatory; the Board retained that test because it is an appropriate way of ascertaining "purpose." See also Dixon J.'s judgment in *Stenhouse* v. *Coleman*.[184] "Purpose" has nothing to do with motive; it depends on the operative effect, and the operative effect is to be gauged by taking the whole of the law and the circumstances in which it operated. The Act in the *Bank* case[185] on a true view was nothing more than prohibition of those prohibited; it was simply prohibition for prohibition's sake. If it be true that the Transport Act does nothing more than merely prohibit, then it will fall in the same way; but if it does more, then different considerations apply.

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[177] [1932] A.C. 542.
[178] [1936] A.C. 578.
[179] [1950] A.C. 235.
[180] [1932] A.C. 542.
[181] 43 C.L.R. 386, 408.
[182] (1915) 20 C.L.R. 54, 98.
[183] [1950] A.C. 235.
[184] (1944) 69 C.L.R. 457, 471.
[185] [1950] A.C. 235.

At the end of *James* v. *Cowan* [186] it still remained undetermined whether section 92 was concerned with the flow of trade as a whole, with the regulation of trade notwithstanding its prohibitory effect upon individuals, or whether it was concerned with the trade of the individual. The actual decision in *James* v. *Cowan* [186] was nothing more than that the orders of the Minister were outside statutory power or invalid because they were quantitative restrictions on inter-State trade: that case and *James* v. *South Australia* [187] decided no more than that. At the end of the *James* litigation in 1932 any of these three conceptions might have been selected by the court in the future development of the law: (i) total flow guaranteed by the Act; (ii) regulation of the trade of an individual; (iii) regulation of the trade as a whole. The first view was unequivocally rejected, that is, the test was never whether the law affected the total flow of trade; it was rejected in the *Bank* case [188] and is therefore clearly not the law. It is submitted that no unequivocal choice has been made between the other two. The choice has been made by the High Court, which was open to it after *James* v. *Cowan*,[189] in favour of the third—regulation of the trade as a whole. There is a series of cases on that. The question is whether the *Bank* case [190] precluded the choice. The important part of this discussion is to determine whether appropriate criteria can be enunciated for determining whether an Act is regulation of a trade as a whole or simple prohibition and therefore invalid. In the end it is a problem of balance.

The issue here—does section 92 deny that form of co-ordination by a regulatory statute—did not arise in the *Bank* case.[190] That fundamental issue, which has now to be considered by this Board on its own feet, ought not to be decided by implication by isolated sentences which may have a wider or a narrower meaning. The *Bank* case [190] is not authority for the principle the Commonwealth advances, but it does not deny the principle. The total effect of the material passages in the *Bank* case [190] is to suggest that whether it was the trade which was to be regulated or an individual was a difficult and far-reaching problem which it was no purpose of the Board then to determine. In determining whether a law is regulatory, one must take the Act as enacted, the circumstances in which it operates, and face up to the problem whether it was therefore regulatory of the trade. The question is, is this statute, doing what it does and in the circumstances in which it exists, contrary to the constitutional dictates?

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[186] [1932] A.C. 542.
[187] 40 C.L.R. 1, 42.
[188] [1950] A.C. 235.
[189] [1932] A.C. 542.
[190] [1950] A.C. 235.

In *James* v. *The Commonwealth* [191] the actual decision was that a quantitative restriction of inter-State trade in dried fruit was invalid. The importance of the *Milk Board* case [192] is that it was concerned with the power of the milk board to control the source of supply; it was not an absolute prohibition. In the *Peanut Board* case [193] the peanut board was nothing but a trading organization; there was there nothing more than a substitution of the peanut board as traders for the owners of peanuts as traders. A law may be made regulating inter-State trade if the regulation is necessary and desirable for the protection of an interest of the community, the maintenance of which interest is necessary for the continuance and enjoyment of freedom to carry on inter-State trade itself. That is the least that must be admitted. A number of Acts have been passed both before and after the *Bank* case [194] which involve prohibition in whole or in part; one cannot tell whether those Acts are good or bad without going into all the relevant facts and circumstances, but if the appellant here is right, one can simply say "these Acts limit the right to trade "and that is an end of the inquiry": *Wilcox Mofflin Ld.* v. *State of New South Wales* [195]; *Marcus Clark & Co. Ld.* v. *The Commonwealth.*[196] Regulations were made in wartime, e.g., there was a complete system of selling and buying petrol, but they may be justified in wartime in the interests of the community.

An analogy is provided by the American Constitution with regard to the permissible spheres of the legislature and the court. [Reference was made to *Gitlow* v. *New York,*[197] *Fiske* v. *Kansas,*[198] *Schenck* v. *United States,*[199] *Thornhill* v. *Alabama,*[200] *Drivers Union* v. *Meadowmoor Co.,*[201] *Bridges* v. *California,*[202] *Beauharnais* v. *Illinois,*[203] *Dennis* v. *United States,*[204] *Joseph Burstyn, Inc.* v. *Wilson,*[205] *Home Building and Loan Association* v. *Blaisdell,*[206] *Acker* v. *United States* [207] and *East New York Bank* v. *Hahn.*[208]] The Supreme Court of the United States have said over and over again that the right of free speech is a fundamental right of their political system, and they have had to decide what is and what is not a permissible regulation of such right. There have also been passed in the United States a whole series of anti-picketing laws in respect of which ultimately the test has been laid down whether there was an attempt to use the constitutional right to violate valid laws designed to protect important interests of the community. The approach to be deduced from this foreign doctrine is that the constitutional right must be qualified by the necessity of the constitutional order or system in which it exists and which gave it birth. Then the problem is, what are the qualifications on the right which an ordered system does demand? It may be doubted whether "absolutely" really makes any difference. What are the interests to be protected or the evils to be prevented; can they be described or classified? The following propositions are submitted: (1) The following considerations apply to laws under which some competent traders may be excluded from trading inter-State (or some form or portion of inter-State trade may be prohibited). On the other hand, if a law upon its true interpretation controls trade in some other manner (e.g., by controlling methods of trading), the fact of regulation will be self-evident. This question of interpretation is for the court.

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[191] [1936] A.C. 578.
[192] 62 C.L.R. 116, 145.
[193] 48 C.L.R. 266.
[194] [1950] A.C. 235.
[195] 85 C.L.R. 488, 507.
[196] (1952) 87 C.L.R. 177.
[197] (1925) 268 U.S. 652.
[198] (1927) 274 U.S. 380.
[199] (1919) 249 U.S. 47.
[200] (1940) 310 U.S. 88.
[201] (1941) 312 U.S. 287.
[202] (1941) 314 U.S. 252.
[203] (1952) 343 U.S. 250.
[204] (1951) 341 U.S. 494.
[205] (1952) 343 U.S. 495.
[206] (1934) 290 U.S. 398.
[207] (1936) 298 U.S. 426.
[208] (1945) 326 U.S. 230.

(2) In the case of laws "excluding or prohibiting in part," the operative effect in the relevant circumstances must be ascertained to determine whether Parliament is protecting a community interest (i.e., preventing some evil) the maintenance of which interest (or prevention of which evil) is necessary for the continued enjoyment of the freedom to trade, either wholly or in respect of some particular trade. There are two functions for the court: (a) the interpretation (i.e., ascertainment of operative effect) of the law; (b) the weighing of the significance of the interest (or evil).

(3) If the court finds as a matter of interpretation that no interest is being protected (or evil prevented) the law will be revealed as simple prohibition and invalid. The object or purpose of the law will be nothing more than the exclusion of traders. This will be prohibition for prohibition's sake.

(4) The court may find that the law is directed to protecting an interest (preventing an evil) which would show it to be regulatory but find also that in operative effect the law goes further than to protect the interest (or prevent the evil). The law will then exceed the basis which otherwise would have shown it to be regulatory and it will in such circumstances be either in part or

in whole invalid. This is not "simple prohibition" but regulation plus prohibition. It is the function of the court to determine this matter. A case where the law was not confined to a basis which would have resulted in its being valid was *Gratwick* v. *Johnson.*[209] The law prohibited inter-State travel on a basis not capable of justification—and this was a matter for the court. A transport Act which prohibited inter-State transport not only for purposes of co-ordination but for some other unacceptable purposes (or for no defined purposes) would be (either totally or partly) invalid for similar reasons. The law must be confined to (or responsive to) the protection of the interest or the prevention of the evil which gives it the regulatory character. Whether it is so confined is a legal question for the court.

(5) The question can still arise as to the particular method of control to be adopted (e.g., discretionary licensing; rationing prescribed by statute; partial prohibition expressed in a statute, etc.). The choice of any one method is entirely for Parliament and is not a matter for the court. When Parliament has made the choice the court interprets the operative effect of the law. The form of the statute may result in its invalidation, but not because the court prefers some other method, but because the selected method is found to be not regulatory, that is, because it goes too far. Illustrations of this fifth head are the *Milk Board* case,[210] *Andrews* v. *Howell*[211] and the transport cases. [Reference was also made to *Stenhouse* v. *Coleman.*[212]]

Political considerations cannot be excluded in applying a constitution: *Melbourne Corporation* v. *The Commonwealth.*[213] If the Commonwealth's submissions are right, *Nelson's* case[214] was rightly decided; the interest of New South Wales in preventing diseased cattle from entering is so vital to the interest of the State that the act of transport may be stopped at the border; so it may be that this, though prohibition, is nevertheless regulation of the trade. See, also, *Rex* v. *Connare,*[215] *Rex* v. *Martin*[216] and *Tasmania* v. *Victoria,*[217] as explained with approval in the *Bank* case,[218] which are cases which fall into the pattern of the test submitted.

Having attempted to put a positive theory about the nature of regulation, some criticisms of the opposing view may be made.

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[209] 70 C.L.R. 1.
[210] 62 C.L.R. 116.
[211] 65 C.L.R. 255.
[212] 69 C.L.R. 457, 469.
[213] (1947) 74 C.L.R. 31, 82.
[214] 42 C.L.R. 209.
[215] (1939) 61 C.L.R. 596.
[216] (1939) 62 C.L.R. 457.
[217] 52 C.L.R. 157.
[218] [1950] A.C. 235, 312.

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It is difficult to understand what is the affirmative view of regulation which counsel for the appellant as a matter of general principle has asserted. He said that nothing is regulatory in law unless it is a law to accommodate one trader's freedom in inter-State trade to the freedom of another trader; it must be imposed in order to ensure that the other trader must have an equal freedom with the trader so regulated. Regulation, it is submitted, is that measure of control in inter-State trade which the constitution presupposes. There is no logical ground for confining the word to the appellant's very narrow area. And, secondly, he did not adhere to his conception of regulation. In the case of defence, it is the subordination of individual interests to the public good. Practical experience showed that one could not limit the conception of freedom in the way submitted for the appellant, and examples which he gave are really inconsistent with his theory.

Next, how does one determine whether the interests are important enough to be protected? If the interest being protected or the evil being prevented is itself economic commercial trading and not some other community interest, such as health or survival in war, morals and so on, two considerations arise: (i) how fundamental, how basic, is the trade or industry; can it be unmistakenly predicated that the legislature is protecting an interest of a fundamental kind; and (ii) what may be being protected, or being prevented, is some non-economic danger, though what the legislature is doing is dealing with some economic or trade matter. Given the time, place and circumstance, one may still have a monopoly and it is still regulatory. Monopoly is so obviously a departure from freedom of inter-State trade that it is only justified by extreme circumstances. It is not lightly to be assumed that the interest is of such a character as will really justify anything of that kind. The *Airways* case [219] and the *Bank* case [220] raise problems of simple prohibition.. In applying this matter to the transport cases, the interest being protected by the legislation is the permanence and stability of land transport, so that if one does not so enact one has such impermanence and basic insecurity as seriously to affect the whole economy. Every civilized community has had to legislate in this manner. The interest is so universal as to be beyond mere partisan argument. In view of the interest to be protected, this is not a very difficult case. The similarity between the Victorian Act in *McCarter* v.

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[219] 71 C.L.R. 29.

[220] [1950] A.C. 235.

Brodie[221] and the English Road and Rail Traffic Act of 1933 (23 & 24 Geo. 5, c. 53) is striking, and one can only suppose that the evil itself must have been similar. See also the Road Traffic Act, 1930 (20 & 21 Geo. 5, c. 43) and *McCartney* v. *Victorian Railways Commissioners*,[222] which was upheld on appeal.[223]

On the question of reconciling individual rights with the legislative power to regulate transport, see the *Airways* case,[224] *Clements & Marshall Pty. Ld.* v. *Field Peas Marketing Board (Tasmania)*,[225] the *Bank* case,[226] *McCarter* v. *Brodie*,[227] *Wilcox Mofflin's* case[228] and *Hospital Provident Fund Pty. Ld.* v. *State of Victoria*.[229] With regard to the problem of discrimination against inter-State trade, such discrimination is a much more difficult and complex a conception than one imagines at first sight, and in the *Riverina* case[230] Rich and Evatt JJ. both took the view that if there really was discrimination then the court would mould procedure to prevent it if it was contrary to section 92.

Finally, on the question of mileage charges, the course the argument has taken presents matters of far-reaching importance to the Commonwealth. It was said for the appellant that inter-State trade cannot be taxed; that mileage charges are taxes and therefore invalid. It was said for the respondents that inter-State trade can be taxed; that mileage charges are a tax and therefore valid. That is a contest about which the Commonwealth have no concern, but they are concerned that this Board should not in coming to a conclusion lose sight of the very complicated and important problems which are wrapped up in the expression "you "may not tax inter-State trade." It may be that the mileage charges were being imposed as a normal detailed instrument of co-ordination; if that is so, this question of the right to tax inter-State trade does not arise.

As to the problem of reading down; if provisions are shown to be more than regulatory it would in many cases be a simple problem of severability. When one comes to a law based on a licensing system, however, the situation changes very much, and the question is, is the trade unfree? The granting of a licence cannot be rendering the trade unfree.

J. G. Le Quesne, for the States of Victoria and Queensland, adopted the argument for the respondents and joined in their submission that the appeal should be dismissed.

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[221] 80 C.L.R. 432.
[222] [1953] V.L.R. 51.
[223] 52 C.L.R. 383.
[224] 71 C.L.R. 29, 110.
[225] (1947) 76 C.L.R. 401, 409.
[226] 76 C.L.R. 1, 283–4.
[227] 80 C.L.R. 432, 472–3.
[228] 85 C.L.R. 488, 531.
[229] (1953) 87 C.L.R. 1, 27.
[230] 57 C.L.R. 327, 358, 370.

Sir Garfield Barwick Q.C. in reply. There is no decision of this Board that the Transport Acts are valid. Approval of the decisions of an inferior court in some matter other than an appeal from or directly involving that decision is not a decision in any relevant sense, and that is particularly so in the interests of parties who were not before the Board at the time of the approval: *Bourne* v. *Keane*.[231] This is an appeal, and is the first occasion on which the interested parties have had an opportunity of presenting the case on the validity of the Transport Acts before this Board. This case cannot be placed in the same class as the *Canada Temperance Federation* case.[232] The Board cannot be influenced now by the discretionary advice given to His Majesty as the result of the petitions for special leave to appeal. So far as the *Bank* case [233] is concerned, there was really no opportunity for overruling *Vizzard's* case.[234] Treating the doctrine of stare decisis as being applicable, the decisions in question are not old in any relevant sense; they have not been acted upon in the sense in which parties deal with contracts for property; and the decisions have not been universally accepted in Australia. There has in fact been no approval of the decisions. Section 92 withdraws power from the States and from the Commonwealth; everything is subject to it: *Nelungaloo Pty. Ld.* v. *Commonwealth of Australia*.[235] The Board's relevant function is to construe the statute; any limitation is in the word "free" itself. Because the State is without power so to do, an Act which either itself impairs or authorizes an impairment of the guaranteed freedom is invalid. That is consistent with what was said in the *Bank* case,[236] *James* v. *Cowan* [237] and the *Airways* case.[238] By reason of the reading down provision, the Act can be confined in its operation so as to exclude any authority to do that which it is held would be invalid as impairing the freedom. Applying that to this case, the principal offending section is section 12 which, according to its terms rightly construed, does prevent the appellant travelling on an inter-State journey in trade; and nobody contends that it has not that operation.

There is really no similarity between the American provisions for free speech and section 92. In this Constitution section 92 is paramount and stands over all. This Board has said that "freedom" means freedom for individuals in inter-State trade and travel, and in the *Bank* case[239] that the critical thing was the operation of the law; what did it do? It was said for the respondents that if the Act is otherwise regulatory, then the prohibitions complained of take their colour from the Act and are regulatory. The answer to that is to be found in the *Airways* case.[240] For the Commonwealth it was said that regulation can take the form of choosing actors in the trade if Parliament has legislated pursuant to some end which the court thinks of sufficient fundamental character in the interest of the State as to justify an invasion of the guaranteed freedom. See, however, *James* v. *The Commonwealth*[241] and *Gratwick* v. *Johnson*[242]—the latter was a most outstanding illustration of a public interest.

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[231] [1919] A.C. 815, 859–60, 914; 35 T.L.R. 560.

[232] [1946] A.C. 193.

[233] [1950] A.C. 235.

[234] 50 C.L.R. 30.

[235] [1951] A.C. 34, 47.

[236] [1950] A.C. 235, 305.

[237] 43 C.L.R. 386, 421; [1932] A.C. 542, 558.

[238] 71 C.L.R. 29, 66.

[Reference was also made to *Graham* v. *Paterson*,[243] *Fergusson* v. *Stevenson*,[244] *Cam & Sons Pty. Ld.* v. *Chief Secretary of New South Wales*,[245] *Carter* v. *Potato Marketing Board*,[246] *Regina* v. *Wilkinson; ex parte Brazell, Garlick and Ley*.[247]] With regard to the regulatory test, the laws in question must fundamentally relate to the carrying on of the trade and must be fundamentally concerned with the trade, in the sense of made in the interests of the trade. Regulatory laws are those in the nature of rules which are capable of being thought necessary for the conduct of the inter-State activities of individuals. As to the mileage charge, by its use a man can be stopped from carrying, and it is prohibition. If it is an instrument of co-ordination it must be prohibitive. The respondents are bound to concede that it is a tax which can be used as an instrument of any policy of the State, and is just as destructive of inter-State freedom of trade as any customs duty. Freedom of inter-State trade is vital to the Federation.

November 17. The judgment of their Lordships was delivered by Lord Morton of Henryton, who stated the facts and statutory provisions set out above and continued: Their Lordships find it unnecessary to travel in detail through the pleadings, for it is now clear that the first question which arises on this

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[239] [1950] A.C. 235, 307, 310.
[240] 71 C.L.R. 29, 66.
[241] [1936] A.C. 578, 625.
[242] 70 C.L.R. 1, 11.
[243] (1950) 81 C.L.R. 1.
[244] (1951) 84 C.L.R. 421.
[245] (1951) 84 C.L.R. 442.
[246] (1951) 84 C.L.R. 460.
[247] (1952) 85 C.L.R. 467.

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appeal is: whether the licensing provisions of the Transport Act, considered apart from the provisions of section 3 (2) thereof, are invalid as contravening section 92 of the Constitution.

It was contended by counsel for the respondents that their Lordships should refrain from considering this question, and should apply the principle stare decisis, in view of a line of decisions of the High Court of Australia, referred to throughout the hearing as "the transport cases." Their Lordships are informed that this principle was relied on by the respondents at the hearing of the appellant's application for special leave to appeal, and that the Board then intimated that it would be open to the respondents to put forward the contention just stated, at the hearing of the appeal. Their Lordships have considered this contention, but have decided to reject it, for reasons which will appear later.

If the first question is answered in the affirmative, a second question will arise: what is the effect of section 3 (2)?

The appellant contends that question (1) should be answered in the affirmative, adding that by reason of section 3 (2) the Transport Act may not be wholly invalid but its licensing provisions are inapplicable to the appellant while operating its vehicles in the course and for the purposes of inter-State trade, or to the vehicles while so operated. It claims a declaration to this effect. If their Lordships are of opinion that the appellant is entitled to the declaration claimed, no question will arise as to the validity of the imposition of the mileage charges already mentioned, since the appellant will not be bound to apply for a licence under the Act, and the charges are imposed on the granting of a licence.

The question whether the Transport Act does or does not contravene section 92 was considered by the High Court of Australia as long ago as 1933, in the case of *Rex* v. *Vizzard.*[1] That case was the second of the line of cases referred to as "the "transport cases" and it gave rise to a marked difference of opinion in the High Court. By a majority of four to two (Gavan Duffy C.J., Rich, Evatt and McTiernan JJ.; Starke J. and Dixon J.—as he then was—dissenting) it was held that the Transport Act did not contravene section 92.

Their Lordships find it convenient to trace the history of the transport cases in some detail, first in view of the contention that the principle stare decisis should be applied in the present case, secondly because it has been suggested by counsel for the respondents that *Vizzard's* case [1] was approved by the Board in *James* v. *Commonwealth of Australia*,[2] and thirdly because it is impossible fully to appreciate the judgments delivered in the High Court in the present case without a survey of the events leading up to those judgments.

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[1] (1934) 50 C.L.R. 30.

The transport cases were preceded by the cases of *James* v. *South Australia* [3] and *James* v. *Cowan*.[4] These two cases are of great importance for the present purpose, and their Lordships will quote at once the summary of the facts and judgments in those cases which is to be found in the judgment of the Board in *Commonwealth of Australia* v. *Bank of New South Wales* [5] (hereafter referred as " the *Bank* case "): " The facts in *James* " v. *Cowan* [6] can only be understood if they are read in conjunction with the earlier case of *James* v. *State of South* " *Australia*.[7] James carried on business in South Australia as " a grower and producer of dried fruits and in the course of it " sold his products outside that State. For reasons, which have " been many times stated in judgments of this Board and of " the High Court and need not be repeated, the Commonwealth " and certain of the States, including South Australia, had " recourse to legislation to deal with the whole question of " marketing dried fruits. In 1924 the South Australian legislature enacted the Dried Fruits Act, 1924. The material " provisions of this Act are set out at large in the judgment of " *James* v. *Cowan*.[8] It is essential only to notice that the Act " contained two sections, section 20 and section 28, each of which " authorized an interference with the free disposal by the grower " of his products, section 20 by empowering the Dried Fruits " Board, which was established under the Act, in its absolute " discretion to determine where and in what quantities the output " of dried fruits produced in any year should be marketed, and " section 28 (which was expressed to be subject to section 92 of " the Constitution) by empowering the Minister to purchase by " agreement, or acquire compulsorily, any dried fruits in South " Australia grown and dried in Australia subject to certain " exceptions which need not be particularized.

" In the earlier case of *James* v. *State of South Australia* [9]

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[1] (1934) 50 C.L.R. 30.

[2] [1936] A.C. 578; 52 T.L.R. 696; [1936] 2 All E.R. 1449.

[3] (1927) 40 C.L.R. 1.

[4] [1932] A.C. 542; 48 T.L.R. 564.

[5] [1950] A.C. 235, 303–4; 65 T.L.R. 633; [1949] 2 All E.R. 755.

[6] [1932] A.C. 542.

[7] 40 C.L.R. 1.

[8] [1932] A.C. 542.

[9] 40 C.L.R. 1.

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"it was in the first place the validity of section 20 of the Act "and of determinations made under it that came in question, "and it was held by the whole court (Isaacs A.C.J., Gavan "Duffy, Rich, Starke and Powers JJ.) that that section, so far "as it authorized a determination by the Board limiting the "quantities of dried fruits which might be marketed within "the Commonwealth, was obnoxious to section 92. From the "decision of the High Court no appeal was brought to this "Board. But, section 20 failing him, the Minister of Agriculture "in South Australia sought to make use of his powers under "section 28. Once more James invoked section 92 of the "Constitution, and in the case of *James* v. *Cowan*[10] challenged "the validity of the executive action taken under section 28, "and it was in this case when it came before the Board that the "decision was given, which, as their Lordships think, goes far "to determine the present case. For, as part of the ratio "decidendi of the case and by no means obiter or by way of a "historical narrative, the Board expressly affirmed the decision "of the High Court in *James* v. *State of South Australia*.[11] The "primary importance of the decision lies in this, that in regard "to section 20, Lord Atkin, delivering the opinion of the Board, "said[12]: 'In the result, therefore, one returns to the precise "'situation created by section 20 with its determination of where "'and in what quantities the fruit is to be marketed. Section 20 "'and the determinations are invalid, and for precisely the same "'reasons it appears to their Lordships inevitable that the "'exercise of the powers of the Minister, crediting him with "'the precise object and intention found by the High Court, "'were also invalid.'"

The first of the transport cases was *Willard* v. *Rawson*.[13] In that case the court by a majority (Dixon J. dissenting) held that a law of the State of Victoria requiring every motor-car to be registered by the Chief Commissioner on payment of a licence fee, and making it an offence to use an unregistered motor-car on a public highway, did not infringe section 92. Their Lordships were not invited to review this case, which involved the consideration of an Act very different in its terms from the Act under consideration in the present case.

In *Vizzard's* case[14] the High Court had to consider for the first time precisely the same question as is now before their

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[10] [1932] A.C. 542.

[11] 40 C.L.R. 1.

[12] [1932] A.C. 559.

[13] (1933) 48 C.L.R. 316.

[14] 50 C.L.R. 30.

Lordships—does the Transport Act contravene section 92 of the Constitution? Starke J. and Dixon J. would have answered this question in the affirmative, and delivered powerful dissenting judgments, relying, inter alia, on the two *James* cases, but they were outvoted, as has already been stated. Their Lordships will consider at a later stage the reasons on which the judgments of the majority were based, but one observation can be made at once. Their Lordships feel that the majority did not attach sufficient weight to the aspects of the two *James* cases which were emphasised, 17 years later, in the passage just quoted from the judgment in the *Bank* case.[15]

Next came the case of *O. Gilpin Ld.* v. *Commissioner for Road Transport and Tramways* (*N.S.W.*).[16] The High Court held that the provisions of the Transport Act, and in particular a charge imposed under section 37 thereof, did not contravene section 92 of the Constitution. The majority followed its own decision in *Vizzard's* case,[17] while Starke and Dixon JJ. again dissented.

The result was the same in the next case, *Bessell* v. *Dayman.*[18] The Act under consideration was the Road and Railway Transport Act, 1930–1931, of South Australia, and it was held to be indistinguishable from the Transport Act.

Next came *Duncan and Green Star Trading Co. Pty. Ld.* v. *Vizzard,*[19] yet another case decided under the Transport Act. In that case the question in issue related primarily to a licence which had been issued to a consignor of goods by motor-lorry from Melbourne to a town in New South Wales situate more than 50 miles from the border. It was held by Rich, Evatt and McTiernan JJ. that the provisions of section 92 of the Constitution were not infringed by the Act or by the Regulations thereunder or by the administration of the Act as disclosed in the evidence and the terms of the licence. Starke J. dissented, but Dixon J. felt bound to accept the majority decision, holding that the decisions of the majority of the court in *Vizzard's* case,[20] *Gilpin's* case[21] and *Bessell* v. *Dayman*[22] completely covered the question of the validity of the licence.

At this stage came the decision of the Board in *James* v. *The Commonwealth of Australia.*[23] The effect of that case was to establish that section 92 of the Constitution binds the Parliament of the Commonwealth of Australia equally with the States. The Act under consideration was the Dried Fruits Act, 1928–1935, of the Commonwealth Parliament, and the Dried Fruits (Inter-State Trade) Regulations, 1934, made pursuant thereto, and their Lordships first considered the wider constitutional question as to the effect of section 92. Lord Wright, in delivering the judgment of the Board, stated the argument put forward " that there is such " an antinomy between section 51 and section 92 that they cannot " both apply to the Commonwealth " and proceeded as follows [24]: " Before turning to the statute with the object of construing its " language in order to settle the problem, it seems to be convenient to refer briefly to some of the decisions of the High " Court and to the decision of the Judicial Committee in order " to see if they support the theory that there is the complete " antinomy or overlapping between the two sections which has " been propounded. It will be remembered that these decisions " deal with section 92 as applied to the States, but they are " helpful in seeking to ascertain what exactly section 92 means."

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[15] [1950] A.C. 235, 303–4.
[16] (1935) 52 C.L.R. 189.
[17] 50 C.L.R. 30.
[18] (1935) 52 C.L.R. 215.
[19] (1935) 53 C.L.R. 493.
[20] 50 C.L.R. 30.
[21] 52 C.L.R. 189.
[22] 52 C.L.R. 215.
[23] [1936] A.C. 578.

In the course of its survey of cases the Board referred to *Vizzard's* case,[25] and in particular to the judgment of Evatt J. and to a passage quoted from that judgment, in terms which, standing by themselves, might well be read as an approval of the decision in *Vizzard's* case [25] and of the whole of Evatt J.'s judgment. Their Lordships cannot, however, so read the passage in question, having regard to the context. It occurs in a survey of certain cases for a particular purpose which had already been stated on page 616, and the survey is described as being [26] " inevitably " brief and incomplete " and " undertaken simply in order to " show that the propositions laid down in *McArthur's* case,[27] " which are the foundation of the respondent's argument that " section 92 does not bind the Commonwealth, were not merely " novel when first enunciated, but have not been applied by the " High Court in practice in subsequent decisions, though " re-affirmed from time to time in dissenting judgments." One passage from the judgment of Evatt J. in *Vizzard's* case [28] was, however, undoubtedly approved by the Board in *James* v. *Commonwealth of Australia.*[29] That passage was in the following terms: " Section 92 does not guarantee that, in each " and every part of a transaction which includes the inter-State

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[24] [1936] A.C. 578, 616.
[25] 50 C.L.R. 30, 94.
[26] [1936] A.C. 625.
[27] (1920) 28 C.L.R. 530.
[28] 50 C.L.R. 30, 94.
[29] [1936] A.C. 621–2.

"carriage of commodities, the owner of the commodities, together "with his servant and agent and each and every independent "contractor co-operating in the delivery and marketing of the "commodities, and each of his servants and agents, possesses, "until delivery and marketing are completed, a right to ignore "State transport or marketing regulations, and to choose how, "when and where each of them will transport and market the "commodities."

In their Lordships' view it does not follow from the approval given to these observations that the Board considered how far "State transport or marketing regulations" could go without contravening section 92 of the Constitution. In the *Bank* case [30] the Board referred to these observations of Evatt J. and observed: "But it does not appear to their Lordships that the whole of that "learned judge's reasoning received the considered approval of "the Board" (i.e., of the Board in *James* v. *Commonwealth of Australia* [31]). ". . . In this connexion it may be noted that "in *James* v. *Cowan* [32] their Lordships observed that they "found themselves 'in accord with the convincing judgment "'delivered by Isaacs J. in the High Court.' The decisions in "*James* v. *Cowan* [32] and in *Vizzard's* case [33] may be reconciled: "it would not be easy to reconcile all that was said by Evatt J. "in the one case with all that was said by Isaacs J. in the other."

From this passage it seems clear that the Board in the *Bank* case [34] did not construe the judgment in *James* v. *Commonwealth of Australia* [35] as approving the decision in *Vizzard's* case [36]; that they felt some doubt as to whether that decision could be reconciled with the decision in *James* v. *Cowan* [37]; and that they certainly did not accept as correct all that was said by Evatt J. in *Vizzard's* case.[38]

The Board's judgment in *James* v. *Commonwealth of Australia* [39] concluded: "For these reasons their Lordships are of "opinion that section 92 binds the Commonwealth. On that "footing it seems to follow necessarily that the Dried Fruits Act, "1928–35, must be held to be invalid. On the interpretation of "'free' in section 92, the Acts and the Regulations either prohibit entirely, if there is no licence, or if a licence is granted, "partially prohibit inter-State trade. Indeed, the contrary was

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[30] [1950] A.C. 235, 309.
[31] [1936] A.C. 578.
[32] [1932] A.C. 542, 561.
[33] 50 C.L.R. 30.
[34] [1950] A.C. 235.
[35] [1936] A.C. 578.
[36] 50 C.L.R. 30.
[37] [1932] A.C. 542.
[38] 50 C.L.R. 30, 71.
[39] [1936] A.C. 578, 633.

"but faintly contended if the Commonwealth were held to be "bound by the section. The conclusion of the matter is that in "their Lordships' judgment section 92 applies to the Commonwealth, and that being so, the Dried Fruits Act and Regulations "should be declared invalid as contravening section 92."

After the decision in *James* v. *Commonwealth of Australia*[39] there came yet another of the series of transport cases, *Riverina Transport Pty. Ld.* v. *State of Victoria.*[40] The Victorian Act in question in that case, the Transport Regulation Act, 1933, as amended by the Transport Regulation Act, 1935 (Vict.), provided that a commercial goods vehicle should not operate on any public highway unless licensed in accordance with the Act. The Transport Regulation Board was empowered to grant such licences, and it was provided that in granting or refusing licences the board should have regard to the interests of the public generally and should take into consideration the advantages of the service proposed to be provided and its convenience to the public, the adequacy of the existing transportation service and the effect on it of the service proposed to be provided, and the character, qualifications and financial stability of the applicant. It was further provided that no decision of the board granting or refusing a licence should have any force or effect until reviewed by the Governor in Council, and that the Governor in Council might approve or disapprove the decision of the board or make any determination in the matter which the board might have made.

It is unnecessary for the present purpose to set out the facts of that case or the claims made by the plaintiff, who operated services for the carriage of goods between Melbourne and places in New South Wales. Suffice it to say that the validity of the Act in question was treated by all the members of the court as established by the transport cases, and Latham C.J.[41] expressed the view that the Board in *James* v. *The Commonwealth*[42] approved the decision in *Vizzard's* case[43] and expressly approved the judgment of Evatt J. therein. For the reasons already given their Lordships cannot accept this view.

Between the *Riverina* case[44] and the *Bank* case[45] came a case of great importance for the present purpose, decided in

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[39] [1936] A.C. 578.
[40] (1937) 57 C.L.R. 327.
[41] Ibid. 340.
[42] [1936] A.C. 578.
[43] 50 C.L.R. 30.
[44] 57 C.L.R. 327.
[45] [1950] A.C. 235.

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1945, *Australian National Airways Pty. Ld.* v. *The Commonwealth.*[46] In that case, which was expressly approved in the *Bank* case, a Commonwealth Act conferring on a Commission a monopoly in respect of aerial services between States was held to infringe section 92, and a Commonwealth Regulation requiring a licence for an inter-State air service, and empowering an official in his uncontrolled discretion to grant or refuse a licence, was also held to infringe section 92.

Their Lordships now turn to the *Bank* case,[47] which precedes in date the last of the transport cases, *McCarter* v. *Brodie.*[48] In the *Bank* case the Board had to consider whether section 46 of a Commonwealth Act, the Banking Act of 1947, was invalid as offending against section 92 of the Constitution. Section 46 is set out in full in the report; in effect it prohibits the carrying on in Australia of the business of banking by private banks, while leaving untouched the Commonwealth and State Banks.

The reasoning of the judgment in the *Bank* case, coupled with the views of the Board on the effect of the three *James* cases and with the Board's approval of the decision in the *Airways* case,[49] is of the utmost assistance to their Lordships in determining the present appeal.

In the *Bank* case, after referring to the cases of *James* v. *South Australia*[50] and *James* v. *Cowan*[51] in the terms already quoted, the Board continued as follows[52]: "Before further "examining what is involved in this decision (i.e., the decision "in *James* v. *Cowan*) their Lordships think it convenient to note "what was actually decided in the other of the two cases which "have come before them. In *James* v. *The Commonwealth*[53] "it was a similar Act, but in this case an Act of the Common-"wealth, that was under attack, and the substantial issue was "whether the Commonwealth, as well as the States, was bound "by section 92. If it was bound, then the further question arose "whether the Act in question was obnoxious to section 92. The "decision of the Board was that the Commonwealth was bound "by section 92, and it is significant that the judgment thus "proceeds[54]: 'For these reasons their Lordships are of opinion "'that section 92 binds the Commonwealth. On that footing it "'seems to follow necessarily that the Dried Fruits Act, 1928–35,

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[46] (1945) 71 C.L.R. 29.
[47] [1950] A.C. 235.
[48] (1950) 80 C.L.R. 432.
[49] 71 C.L.R. 29.
[50] 40 C.L.R. 1.
[51] [1932] A.C. 542
[52] [1950] A.C. 304.
[53] [1936] A.C. 578.
[54] Ibid. 633.

" ' must be held to be invalid. On the interpretation of " free " " ' in section 92, the Acts and the Regulations either prohibit " ' entirely, if there is no licence, or if a licence is granted, " ' partially prohibit inter-State trade. Indeed, the contrary was " ' but faintly contended if the Commonwealth were held to be " ' bound by the section.' There does not in fact appear to have " been any ground for contending that, if the Act which was " challenged in *James* v. *Cowan* [55] was invalid, that challenged " in *James* v. *The Commonwealth* [56] could be valid.

" It might well appear that these two decisions were a serious " obstacle to the present appellants' case. Section 20 of the " South Australian Act was invalid. It was general in its terms: " it did not discriminate between inter-State and intra-State " trade in dried fruits. But because it authorized a determination at the will of the Board, the effect of which would be to " interfere with the freedom of the grower to dispose of his " products to a buyer in another State, it was invalid. And for " the same reason the Commonwealth Act fell. The necessary " implications of these decisions are important. First may be " mentioned an argument strenuously maintained on this appeal " that section 92 of the Constitution does not guarantee the freedom of individuals. Yet James was an individual and James " vindicated his freedom in hard won fights. Clearly there is " here a misconception. It is true, as has been said more than " once in the High Court, that section 92 does not create any " new juristic rights, but it does give the citizen of State or " Commonwealth, as the case may be, the right to ignore, and, " if necessary, to call upon the judicial power to help him to " resist, legislative or executive action which offends against the " section. And this is just what James successfully did.

" Linked with the contention last discussed was another which " their Lordships do not find it easy to formulate. It was urged " that, if the same volume of trade flowed from State to State " before as after the interference with the individual trader, and " it might be, the forcible acquisition of his goods, then the " freedom of trade among the States remained unimpaired. In " the first place, this view seems to be in direct conflict with the " decisions in the *James* cases (supra); for there the section was " infringed though it was not the passage of dried fruit in general, " but the passage of the dried fruit of James, from State to State " that was impeded. Secondly, the test of total volume is unreal

[55] [1932] A.C. 542.

[56] [1936] A.C. 578.

"and unpractical, for it is unpredictable whether by interference "with the individual flow the total volume will be affected, and "it is incalculable what might have been the total volume but "for the individual interference. Thirdly, whether or not it "might be possible, if trade and commerce stood alone, to give "some meaning to this concept of freedom, in section 92 'trade "'and commerce' are joined with 'intercourse,' and it has not "been suggested what freedom of intercourse among the States "is protected except the freedom of an individual citizen of one "State to cross its frontier into another State or to have such "dealings with citizens of another State as his lawful occasions "may require."

The Board went on to consider, and reject, certain arguments, based upon the *James* cases, which had been put forward by the then appellants in support of the validity of the Banking Act, 1947. Then there followed the observations upon *Vizzard's* case [57] which have already been quoted in part.

The rest of the judgment in the *Bank* case [58] is so important for the present purpose that it ought to be quoted in full: "Their Lordships have thought it proper to deal at considerable "length with the earlier decisions of this Board because so much "reliance was placed on them by the appellants. It is, they "think, clear that, far from assisting the appellants, these two "decisions are, as the respondents have throughout contended, "strongly against them.

"In observing upon the *James* cases [59] and their bearing upon "the present case their Lordships noted that the Act now under "consideration operated to restrict the freedom of inter-State "trade, commerce and intercourse not remotely or incidentally, "but directly. On this, and on a cognate matter, the distinction "between restrictions which are regulatory and do not offend "against section 92 and those which are something more than "regulatory and do so offend, their Lordships think it proper to "make certain further observations.

"It is generally recognized that the expression 'free' in section 92, though emphasized by the accompanying 'absolutely,' "yet must receive some qualification. It was, indeed, common "ground in the present case that the conception of freedom of "trade, commerce and intercourse in a community regulated by "law presupposes some degree of restriction on the individual.

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[57] 50 C.L.R. 30.

[58] [1950] A.C. 235, 309.

[59] [1932] A.C. 542, 561; [1936] A.C. 578.

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" As long ago as 1916 in *Duncan* v. *State of Queensland*,[60] Sir " Samuel Griffiths C.J. said: ' But the word " free " does not " ' mean extra legem any more than freedom means anarchy. " ' We boast of being an absolutely free people, but that does not " ' mean that we are not subject to law,' and through all the " subsequent cases in which section 92 has been discussed, the " problem has been to define the qualification of that which in " the Constitution is left unqualified. In this labyrinth there is " no golden thread. But it seems that two general propositions " may be accepted: (1) that regulation of trade, commerce and " intercourse among the States is compatible with its absolute " freedom, and (2) that section 92 is violated only when a legislative or executive act operates to restrict such trade, commerce " and intercourse directly and immediately as distinct from " creating some indirect or consequential impediment which may " fairly be regarded as remote. In the application of these general " propositions, in determining whether an enactment is regulatory " or something more, or whether a restriction is direct or only " remote or incidental, there cannot fail to be differences of " opinion. The problem to be solved will often be not so much " legal as political, social, or economic, yet it must be solved by " a court of law. For where the dispute is, as here, not only " between Commonwealth and citizen but between Commonwealth and intervening States on the one hand and citizens and " States on the other, it is only the court that can decide the " issue. It is vain to invoke the voice of Parliament.

" Difficult as the application of these general propositions must " be in the infinite variety of situations that in peace or in war " confront a nation, it appears to their Lordships that this further " guidance may be given. In the recent case of *Australian* " *National Airways Proprietary Ld.* v. *The Commonwealth* [61] the " learned Chief Justice used these words: ' I venture to repeat " ' what I said in the former case [viz., the *Milk* case [62]]: One " ' proposition which I regard as established is that simple legislative prohibition (Federal or State), as distinct from regula" ' tion, of inter-State trade and commerce is invalid. Further, " ' a law which is " directed against " inter-State trade and com" ' merce is invalid. Such a law does not regulate such trade, " ' it merely prevents it. But a law prescribing rules as to the " ' manner in which trade (including transport) is to be conducted " ' is not a mere prohibition and may be valid in its application

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[60] (1916) 22 C.L.R. 556, 573.

[61] 71 C.L.R. 29, 61.

[62] (1939) 62 C.L.R. 116, 127.

"'to inter-State trade, notwithstanding section 92.' With this "statement, which both repeats the general proposition and "precisely states that simple prohibition is not regulation, their "Lordships agree. And it is, as they think, a test which must "have led the Chief Justice to a different conclusion in this case "had he decided that the business of banking was within the "ambit of section 92. They do not doubt that it led him to a "correct decision in the *Airways* case.[63] There he said: 'In the "'present case the Act is directed against all competition with "'the inter-State services of the Commission. The exclusion of "'other services is based simply upon the fact that the "'competing services are themselves inter-State services. . . . "'The exclusion of competition with the Commission is not a "'system of regulation and is, in my opinion, a violation of "'section 92. . . .' Mutatis mutandis these words may be "applied to the Act now impugned, for it is an irrelevant factor "that the prohibition prohibits inter-State and intra-State "activities at the same time.

"Yet about this, as about every other proposition in this field, "a reservation must be made. For their Lordships do not intend "to lay it down that in no circumstances could the exclusion of "competition so as to create a monopoly either in a State or "Commonwealth agency or in some other body be justified. "Every case must be judged on its own facts and in its own "setting of time and circumstance, and it may be that in regard "to some economic activities and at some stage of social development "it might be maintained that prohibition with a view to "State monopoly was the only practical and reasonable manner "of regulation, and that inter-State trade, commerce and "intercourse thus prohibited and thus monopolized remained "absolutely free.

"Nor can one further aspect of prohibition be ignored. It "was urged by the appellants that prohibitory measures must be "permissible, for otherwise lunatics, infants and bankrupts could "without restraint embark on inter-State trade, and diseased "cattle or noxious drugs could freely be taken across State "frontiers. Their Lordships must therefore add, what, but for "this argument so strenuously urged, they would have thought "it unnecessary to add, that regulation of trade may clearly take "the form of denying certain activities to persons by age or "circumstances unfit to perform them, or of excluding from "passage across the frontier of a State creatures or things

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[63] 71 C.L.R. 29, 61.

" calculated to injure its citizens. Here again a question of fact " and degree is involved which is nowhere better exemplified than " in the Potato case (*State of Tasmania* v. *State of Victoria*[64]), " where the following passage occurs in the judgment of Gavan " Duffy C.J. and Evatt and McTiernan JJ.: ' In the present case " ' it is neither necessary nor desirable to mark out the precise " ' degree to which a State may lawfully protect its citizens " ' against the introduction of disease, but, certainly, the relation " ' between the introduction of potatoes from Tasmania into the " ' State of Victoria and the spread of any disease into the latter " ' is, on the face of the Act and the proclamation, far too remote " ' and attenuated to warrant the absolute prohibition imposed.'

" The same difficulty arises in applying the other discriminatory test, that between a restriction which is direct and one " that is too remote. Yet the distinction is a real one, and their " Lordships have no doubt on which side of the boundary the " present case falls. It is the direct and immediate result of the " Act to restrict the freedom of trade, commerce and intercourse " among the States.

" Their Lordships will not attempt to define this boundary. " An analogous difficulty in one section of constitutional law, " namely, in the determination of the question where legislative " power resides, has led to the use of such phrases as ' pith and " ' substance ' in relation to a particular enactment. These " phrases have found their way into the discussion of the present " problem also and, as so used, are the subject of just criticism " by the learned Chief Justice. They, no doubt, raise in convenient form an appropriate question in cases where the real " issue is one of subject-matter, as when the point is whether a " particular piece of legislation is a law in respect of some subject " within the permitted field. They may also serve a useful " purpose in the process of deciding whether an enactment which " works some interference with trade, commerce and intercourse " among the States is, nevertheless, untouched by section 92 as " being essentially regulatory in character. But where, as here, " no question of regulatory legislation can fairly be said to arise, " they do not help in solving the problems which section 92 " presents. Used as they have been to advance the argument of " the appellants they but illustrate the way in which the human " mind tries, and vainly tries, to give to a particular subject-matter a higher degree of definition than it will admit. In the

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[64] (1935) 52 C.L.R. 157, 168–9.

"field of constitutional law—and particularly in relation to a "federal constitution—this is conspicuously true, and it applies "equally to the use of the words 'direct' and 'remote' as to "'pith and substance.' But it appears to their Lordships that, "if these two tests are applied: first, whether the effect of the "Act is in a particular respect direct or remote; and, secondly, "whether in its true character it is regulatory, the area of dispute "may be considerably narrower. It is beyond hope that it should "be eliminated."

In the *Bank* case[65] it was not necessary for the Board to express a concluded opinion as to whether *Vizzard's* case[66] was or was not rightly decided, since the Banking Act, 1947, differed widely in its terms from the Transport Act. Their Lordships are, however, of opinion that the reasoning of the Board in the *Bank* case,[65] coupled with the comments then made upon the *James* cases, cannot be reconciled with the reasoning of the majority of the High Court in *Vizzard's* case,[66] and that the decision in the latter case cannot stand, unless the provisions of the Transport Act can be justified as being "regulatory" legislation. Each of these matters was fully discussed in the judgments of the minority in *McCarter* v. *Brodie*,[67] and their Lordships will turn at once to that case.

McCarter v. *Brodie*[67] was decided by the High Court shortly after the publication of the judgment of the Board in the *Bank* case.[68] The legislation under consideration was the Victorian Act which had already been held to be valid in the *Riverina* case.[69] It was contended by counsel for McCarter that the reasoning of the majority in *Vizzard's* case[70] was inconsistent with the views expressed by the Board in the *Bank* case[71] and with the decision in the *Airways* case,[72] approved in the *Bank* case. The majority of the court, Latham C.J., McTiernan, Williams and Webb JJ. (Dixon and Fullagar JJ., dissenting), rejected this contention and affirmed the view expressed in the *Riverina* case[73] that the Victorian Act did not contravene section 92 of the Constitution.

Dixon J. in his dissenting judgment referred to his explanation in the *Airways* case[72] of the reasoning upon which the majority decisions in the transport cases were based, and continued as follows,[74] with reference to the judgment of the Board in the

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[65] [1950] A.C. 235.
[66] 50 C.L.R. 30.
[67] 80 C.L.R. 432.
[68] [1950] A.C. 235.
[69] 57 C.L.R. 327.
[70] 50 C.L.R. 30.
[71] [1950] A.C. 235.
[72] 71 C.L.R. 29.
[73] 57 C.L.R. 327.
[74] 80 C.L.R. 465.

Bank case: " I do not think that there is any room for doubting " that their Lordships have rejected as erroneous three propositions that have often been put forward. The first is ' that " ' section 92 of the Constitution does not guarantee the freedom " ' of individuals.' The second is ' that, if the same volume of " ' trade flowed from State to State before as after the interference with the individual trader . . . then the freedom of " ' trade among the States remained unimpaired.' The third " relates to the relevance of absence of discrimination. As I " understand it their Lordships have rejected the theory that " because a law applies alike to inter-State commerce and to the " domestic commerce of a State, it may escape objection notwithstanding that it prohibits, restricts or burdens inter-State " commerce.

" I shall not stop to examine or explain the contraries of these " propositions or to state how they should be understood to " apply. They have been much canvassed and there ought to be " no difficulty in understanding them. All that is important for " present purposes is that in face of the pronouncement of the " Privy Council the propositions themselves are no longer tenable.

" There are two further matters settled by the decision of their " Lordships that are relevant to the basis upon which the transport cases appear to me to rest. One is that the object or " purpose of an Act challenged as contrary to section 92 is to be " ascertained from what is enacted and consists in the necessary " legal effect of the law itself and not in its ulterior effect socially " or economically. The other is that the question what is the " pith and substance of the impugned law, though possibly of " help in considering whether it is nothing but a regulation of a " class of transactions forming part of trade and commerce, is " beside the point when the law amounts to a prohibition or the " question of regulation cannot fairly arise. Now I think that " every one of these five errors will be found to have a place in " what in the passage I have quoted I ventured to call the pragmatical solution which the transport cases gave to a problem " they approached as a complex.

" Trade and commerce was treated as a sum of activities. " The inter-State commercial activities of the individual and his " right to engage in them were ignored. Inter-State commerce " as a whole was considered and the adverse effect upon the total " flow was treated as the test or at all events a test. Great " importance was attached to the absence from the Act of " discrimination against inter-State trade. The purpose imputed "to the Act of making a planned structure of the internal trans-"port of the State was taken into account as another element "weighing in favour of the valid operation of the Act upon inter-"State carriage. But that purpose was a matter of supposed "policy which as it was thought it was the design of the Act to "carry out: not the legal effect of the enacted provisions. The "use of the idea expressed by the words 'pith and substance' "may not appear so clearly; but I think that underlying much "of what is said in the judgments in the transport cases is a "view of the Act which treated the restriction on the carriage "of goods by road as a means of effecting a main purpose of "distributing the traffic between road and rail in a 'rationalized' "manner.

"To these elements one other was added; one not the subject "of consideration by the Privy Council. That element is the "distinction taken between on the one hand motor-vehicles as "integers of traffic and on the other hand the trade of carrying "by motor vehicle as part of commerce. It is a distinction that "I have never understood. The statutes dealt with the com-"mercial use of motor-vehicles and not with motor-vehicles as "such or at rest so to speak. There are tendencies in the trans-"port cases to thrust the carriage of goods and persons towards "the circumference of the conception of commerce, but in the "*Airways* case,[75] it was shown that it must lie at or near the "centre. The combination of ideas upon which, according to "my view, the transport cases are based, consists therefore of no "element which can survive. Five of them have been destroyed "by the judgment of the Privy Council. The sixth would not "suffice as a separate reason and is unsustainable. I am there-"fore of opinion that we should no longer regard ourselves as "bound by the authority of the transport cases.

"It remains to consider whether those decisions can be "supported on independent grounds. Now upon this subject it is "enough to say that I have had the advantage of reading the "judgment of Fullagar J., and entirely agree with it."

Accepting, as they do, the views so clearly expressed by Dixon J., their Lordships are of opinion that the six conceptions dealt with in this passage can no longer be regarded as sound. In their opinion it follows that if the validity of the Transport Act is to be established in the present case, it can only be upon the ground that the restrictions contained therein are "regulatory" in the sense in which that word is used in the *Bank* case.[76]

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[75] 71 C.L.R. 29.

[76] [1950] A.C. 235.

This point is dealt with by Fullagar J. in his dissenting judgment in *McCarter* v. *Brodie*.[77] Having reached the conclusion that the reasoning in *Vizzard's* case [78] was irreconcilable with the law as propounded in the *Bank* case,[76] he continued [79]: " I have " still, however, to consider an argument put before us in support " of *R.* v. *Vizzard*,[78] the major premiss of which argument is not " only consistent with, but supported by, the *Banking Case*. The " major premiss is, in the words of their Lordships, that " ' regulation of trade commerce and intercourse among the " ' States is compatible with its absolute freedom.' And the " minor premiss is that the Transport Regulation Acts of the State " of Victoria are merely regulatory of trade and commerce, " including trade and commerce among the States.

" The distinction between what is merely permitted regulation " and what is a true interference with freedom of trade and " commerce must often, as their Lordships observed, present a " problem of great difficulty, though it does not, in my opinion, " present any real difficulty in the present case. We may begin " by taking a few examples, confining our attention to the subject-matter of transportation, which is now under consideration. " The requirements of the Motor Car Acts of Victoria afford very " good examples of what is clearly permissible. Every motor-car " must be registered: we may note in passing that there is no " discretionary power to refuse registration. A fee, which is not " on the face of it unreasonable, must be paid on registration. " Every motor-car must carry lamps of a specified kind in front " and at the rear, and in the hours of darkness these lamps " must be alight if the car is being driven on a road. Every " motor-car must carry a warning device, such as a horn. A " motor-car must not be driven at a speed or in a manner which " is dangerous to the public having regard to all the circumstances " of the case. Other legislation of the State—Parliamentary or " subordinate—prescribes other rules. In certain localities a " motor-car must not be driven at more than a certain specified " speed. The weight of the load which may be carried by a " motor-car on a public highway is limited. The driver of a motor-car must keep to the left in driving along a highway. He must " not overtake another vehicle on a curve in the road which is " marked by a double line in the centre. He must observe " certain ' rules of the road ' at intersections: for example, the " vehicle on the right has the right of way.

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[76] [1950] A.C. 235.

[77] 80 C.L.R. 432.

[78] 50 C.L.R. 30.

[79] 80 C.L.R. 495.

"Such examples might be multiplied indefinitely. Nobody "would doubt that the application of such rules to an inter-State "trader will not infringe section 92. And clearly in such matters "of regulation a very wide range of discretion must be allowed "to the legislative body. When we ask why such rules do not "infringe section 92, I think that common sense suggests a fairly "clear and satisfactory answer. The reason is that they cannot "fairly be said to impose a burden on a trader or deter him from "trading: it would be foolish, for example, to suggest that my "freedom to trade between Melbourne and Albury is impaired "or hindered by laws which require me to keep to the left of the "road and not drive in a manner dangerous to the public.

"Of course, even rules of the *kind* which I have taken as "examples could be made to operate as a burden or deterrent in "a high degree. Let me take an example. The town of Wangaratta is in Victoria, some fifty miles by road from the border "between Victoria and New South Wales. It is on the Hume "Highway, which is the busy main highway between Melbourne "and Sydney. A law which provided that a motor car should "not travel on that highway at greater speeds than thirty miles "per hour within the limits of towns and sixty miles per hour "outside towns would not impede or interfere with the trade of "persons carrying goods for reward between Melbourne and "Sydney: their trade would remain 'free.' But let me suppose "a law that no person should drive a motor car between Wangaratta and the border at a speed exceeding one mile per hour. "We should instantly say that such a law interfered with the "freedom of inter-State trade. It would operate as a burden and "a deterrent to the trader by making the journey economically "impossible. The examples which I have taken seem clear. On "which side of the line a particular case falls will, of course, "be a question of fact. It may be a difficult question in some "cases, but it does not seem to me likely that any very difficult "question will arise within the sphere of practical politics. The "real, and truly baffling, difficulties of section 92 seem to me to "lie outside the field of transportation. Within that field the "very nature of the subject-matter seems to lend itself to the "application of a quite simple test, which will rarely, if ever, be "productive of any real difficulty. When difficulty does arise, it "will be the kind of difficulty with which lawyers are constantly "called upon to deal in a great variety of cases.

"The question is sometimes raised whether a State—or the "Commonwealth for that matter, since the Commonwealth is

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"equally bound by section 92—can, consistently with section 92, "make a charge for the use of trading facilities, such as bridges "and aerodromes, provided by it. The answer is that of course "it can. The great bridge over Sydney Harbour was erected at "huge expense to facilitate trade, commerce and intercourse "between all places north of the harbour and all places south of "the harbour. The collection of a toll for the use of the bridge is "no barrier or burden or deterrent to traders who, in its absence, "would have to take a longer or less convenient or more expen-"sive route. The toll is no hindrance to anybody's freedom, "so long as it remains reasonable, but it could, of course, be "converted into a hindrance to the freedom of trade. If the "bridge authority really wanted to hamper anybody's trade, it "could easily raise the amount of the toll to an amount which "would be prohibitive or deterrent. It would not be possible "a priori to draw a dividing line between that which would really "be a charge for a facility provided and that which would really "be a deterrent to trade, but the distinction, if it ever had to be "drawn, would be real and clear, and nobody need worry about it "in advance. Nothing but futile exaggeration of the difficulties "of section 92 can result from an insistence on imagining border-"line cases which are excessively unlikely to arise in practice. "If we are ever actually called upon to say whether a money "exaction is really a charge for a facility provided or really a "burden on somebody's freedom to conduct a trade or business "or engage in intercourse, human affairs are such that we are "unlikely to experience any very serious difficulty in making a "decision.

"It is clear enough that such provisions as I have been con-"sidering are properly regarded as regulatory in character, and "therefore within the category which their Lordships have held "to involve no violation of section 92. It should be emphasized "that they are to be examined from the point of view of every "individual engaged in trade, commerce or intercourse, because "section 92 protects the trade, commerce and intercourse of the "famous Mr. James and every other individual. As to what is "*not* regulatory in the relevant sense, one thing at least is clear. "Prohibition is not regulation. Lord Porter,[80] after quoting "from the judgment of the learned Chief Justice of this court in "*Australian National Airways Pty. Ld.* v. *Commonwealth*,[81] said "'simple prohibition is not regulation.'

[80] [1950] A.C. at p. 309.

[81] 71 C.L.R. 29, 61.

"It is quite impossible, in my opinion, to distinguish the "present case from the case of a simple prohibition. If I cannot "lawfully prohibit altogether, I cannot lawfully prohibit subject "to an absolute discretion on my part to exempt from the prohibition. The reservation of the discretion to exempt by the "grant of a licence does not alter the true character of what I "am doing. This was, indeed, as I have pointed out, one of "the two things that were really decided in *James* v. *Commonwealth*,[82] though it was naturally treated as more or less self-"evident, and the contrary view does not seem to have been very "seriously argued. Such cases as *Melbourne Corporation* v. "*Barry* [83] and *Swan Hill Corporation* v. *Bradbury* [84] do not, of "course, afford exact parallels to such cases as the present, "because they turn primarily on the meaning of the word 'regu-"'late' in a statute, but they are, in my opinion, precisely "in point, since one thing that they make plain is that, if a "legislative body cannot lawfully prohibit altogether, it cannot "lawfully prohibit subject to an administrative discretion to "exempt from the prohibition. It is quite true to say that "regulation may involve partial prohibition, but it is quite untrue "to say that total prohibition subject to discretionary exemption "or 'licensing' is merely partial prohibition within the meaning "of that proposition.

"The truth is that it is possible to regard such legislation "as regulatory with respect to trade and commerce if, but not "unless, we regard section 92 as referring not to the trading and "commercial activities of individuals but to a totality or general "volume or flow of trading and commercial activities. A simple "prohibition, or a prohibition subject to discretionary exemption, "of the trade of an individual may be regarded as regulatory of "the general flow or volume of trade. It cannot possibly be "regarded as regulatory of the trade of the individual who is "simply not allowed to carry on his trade at all. The view that "section 92 does not protect an individual trader but has regard "only to a general volume of inter-State trade could hardly have "been more emphatically rejected by the Privy Council, and it "must now, I would think, plainly be regarded as unsound. "And, without it, the view that the Victorian Transport Regulation Act is merely regulatory, so far as it affects inter-State "trade and commerce, cannot stand.

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[82] [1936] A.C. 578.

[83] (1922) 31 C.L.R. 174.

[84] (1937) 56 C.L.R. 746.

"It was argued before us that the regulation of public transport vehicles in respect of such matters as safe maintenance "and so on could not be efficiently undertaken without a system "of inspection and licensing. The same difficulty was felt by "municipalities in connexion with their building by-laws by "reason of such decisions as *Swan Hill Corporation* v. *Bradbury*,[84] but very little ingenuity was required to overcome the "difficulty. The modern Victorian building by-law requires the "issue of a permit or licence to commence building, but it also "provides that, if plans and specifications comply with the "specific requirements of the by-law, the intending builder is "entitled, as of right, to the issue of the licence or permit. The "legal right, so given, is, of course, enforceable by mandamus "to issue the licence or permit. Such a law differs vitally from "a prohibition subject to obtaining a licence which may be "granted or withheld at discretion. The only reason why such "a system would not be regarded as satisfactory in such legislation as that now under consideration is that such legislation is "not really concerned—or at any rate is by no means solely "concerned—with the safety of public transport. It is concerned "very largely with restricting the development, in competition "with existing railways, of modern and convenient methods of "transport, and one of its supposed advantages is that the discretion to withhold licences can be used to protect the trade "of one State at the expense of another. It is, for example, "obviously within the sphere of practical politics that it should "be thought in Melbourne that Cootamundra ought to drink "Victorian beer and not South Australian beer. The protection "of the industries of one State against those of another State "was, of course, one of the primary things which section 92 was "designed to prevent, but, if the legislation now in question is "valid, effect can easily be given to such an opinion without "anybody knowing anything about it. I mention these matters "only by the way and as serving to emphasize the essential vice "of the legislation."

Before expressing their views on the passage just quoted, which is equally applicable to the Transport Act now under consideration, their Lordships will state the events following on the decision in *McCarter* v. *Brodie*.[85] McCarter sought leave to appeal to His Majesty in Council but leave was refused on December 8, 1950.

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[84] 56 C.L.R. 746.

[85] 80 C.L.R. 432.

On August 15, 1952, the present appellant delivered its amended statement of claim, and on April 16, 1953, judgment was given in the High Court. Dixon C.J. expressed his personal opinion in the following trenchant passage[86]: " My personal " opinion has long been that, in the case of provisions of this " description prohibiting transport unless licensed and authorizing " the imposition of such a levy, the question must be answered " that neither the prohibition nor the levy is consistent with " section 92.

" Notwithstanding the failure of this conclusion to gain " acceptance, the more immediate considerations which arise " upon the very face of the statutory provisions, to say nothing " of the levy and the conditions of the licence, still appear to me " to make demands upon reason that are too insistent to admit " of any other answer to the question whether trade, commerce " and intercourse is left absolutely free.

" I take it as finally settled that the burdens and restrictions " against which section 92 protects inter-State commerce are not " only those which are imposed differentially upon inter-State " commerce or affect it in a special manner. Inter-State com- " merce is protected also from restrictions and burdens which fall " alike on commerce confined to a State and commerce crossing " its borders. The carriage of merchandise from one State to " another is not a thing incidental to inter-State commerce but " in the language used by Johnson J. of navigation, in *Gibbons* " v. *Ogden*,[87] is ' the very thing itself; inseparable from it as " ' vital motion is from vital existence.'

" The carriage of goods by road, which forms a most important " part of this very thing, is made the subject of heavy imposts " and of a definite prohibition except in so far as a branch of " the Executive Government of the State thinks fit to permit " particular persons to carry goods by specified vehicles. No " conditions are laid down by the fulfilment of which a man may " become entitled to a licence. It lies entirely within the dis- " cretion of the Director of Transport and Highways acting under " the direction of the Minister. The refusal of an application " for a licence on grounds that are arbitrary or fanciful or that " no man could regard as lying within the scope or policy of the " legislation would not suffice, but the discretion otherwise is " absolute and in no circumstances has anyone an enforceable

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[86] 87 C.L.R. 67.

[87] (1824) 22 U.S. 1, 229.

"title to a licence. To me these rather simple considerations "appear decisive. In face of them I have not been able to see "how it can be said that this branch of inter-State trade is "absolutely free.

"It is not my purpose to enter upon an examination of the "question either in principle or upon authority, excepting of "course the authority of the decision in *McCarter* v. *Brodie*.[88] "But I should perhaps say that to my mind the distinction "appears both clear and wide between, on the one hand, such "levies and such provisions prohibiting transportation without "licence as the foregoing and on the other hand the regulation "and registrations of motor traffic using the roads and the "imposition of registration fees. In the same way the distinction "is wide between such provisions and the use of a system of "licensing to ensure that motor vehicles used for the conveyance "of passengers or goods for reward conform with specified conditions affecting the safety and efficiency of the service offered and "do not injure the highways by excessive weight or immoderate "use or interfere with the use of the highways by other traffic. "The validity of such laws must depend upon the question "whether they impose a real burden or restriction upon inter-State traffic.

"For myself I do not know why a uniform law for the "organization and the regular conduct of motor traffic or a "uniform law prescribing conditions for the business of carrying "by road should be regarded as necessarily impairing the freedom "of inter-State trade, commerce and intercourse. The provision "which in *Willard* v. *Rawson* [89] all the judges but myself upheld "as valid did not appear to me to be of this character. It was "a special provision affecting only motor cars registered in other "States if used in Victoria for the carriage of goods. Motor cars "if registered in another State were exempt from registration in "Victoria and from the payment of the registration fee annually "payable in that State. But the provision impugned specially "withdrew this exemption if the vehicle was used to carry goods. "Thus entry into Victoria of a New South Wales lorry carrying "goods at once exposed it to the levy of what to a Victorian car "would be an annual fee. This appeared to me to be a direct "burden upon inter-State trade. I am quite prepared to accept "the view that my conclusion as to the character or characterization of the provision was erroneous, but it has nothing to do

[88] 80 C.L.R. 432.

[89] 48 C.L.R. 316.

"either with the present case on the one hand or with a general "regulation of transport on the other hand.

"The decisions of this court that the State Transport (Co-"ordination) Act, 1931 (N.S.W.), and the legislation of other "States in pari materia did not infringe section 92 were based "on grounds which, as it seemed to me, were no longer tenable "in face of the reasons of the Privy Council in *Commonwealth "of Australia* v. *Bank of New South Wales*.[90] In *McCarter* v. "*Brodie*,[91] however, a majority of the court decided that notwith-"standing the decision of the Privy Council the transport cases "should be followed. In the present case the plaintiff asks us to "reconsider the question thus decided in *McCarter* v. *Brodie*.[91]

"The strength of the considerations against refusing to follow "that decision is very great. It is a recent decision of the court "dealing with the very question of the authority of the transport "cases. It was fully considered and, whether many of the "reasons and the conclusion of those cases are, as I think, or are "not, at variance with the principles expounded in the *Banking* "case,[90] nothing has occurred since this court decided *McCarter* "v. *Brodie* [91] adding to or altering the considerations then before "the court. These circumstances, in my opinion, make it right "to decline to enter upon a reconsideration of *McCarter* v. "*Brodie* [91] unless independent reasons exist for overruling it "which appear to be imperative.

"I do not waver at all in my belief that the transport cases "cannot be reconciled with principle or in the opinion that the "grounds on which they were in fact decided have for the most "part been expressly rejected in the judgment of the Privy "Council in the *Banking* case,[90] but I do not regard that as "enough."

The learned Chief Justice then went on to give judgment against the appellant, saying[92]: "I believe, however, that I "would regard it as an imperative judicial necessity to overrule "*McCarter* v. *Brodie* [93] if it appeared inevitable that the conse-"quences of the decision would extend beyond the subject of "commercial transport by road and would make it necessary to "hold that over the whole area of inter-State trade, commerce "and intercourse a power existed in every legislature to impose "a prohibition subject to a licence to be granted or refused at the "discretion of the Executive. At first sight it may seem that

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[90] [1950] A.C. 235.
[91] 80 C.L.R. 432.
[92] 87 C.L.R. 70.
[93] 80 C.L.R. 432.

"these consequences ought logically to ensue, if the decision is "allowed to stand. Nevertheless, after a full re-examination of "the transport cases in the light of the reasons of the majority "of the court in *McCarter* v. *Brodie*,[93] I have come to the conclusion that the application of these cases may be confined to "the particular conditions or considerations which arise from "the fact that the railways and the roads form facilities for the "carriage of goods (and presumably of passengers) for the provision and maintenance of which the State is responsible."

It is clear from the foregoing that the Chief Justice did not regard the responsibility of the State for the provision and maintenance of facilities for the carriage of goods and passengers by rail and road as justifying the decision in the transport cases in principle. He merely regarded it as a distinguishing feature in this particular field, the recognition of which would confine the actual decision in *McCarter* v. *Brodie* [93] within limits which enabled him to accept it without its wider implications in other fields.

Their Lordships do not feel able to take so limited a view of *McCarter* v. *Brodie*,[93] more especially since that decision was largely based upon what they consider to be erroneous interpretations of passages in the judgment in the *Bank* case,[94] and of references to *Vizzard's* case [95] by the Board in *James* v. *Commonwealth of Australia*.[96]

McTiernan, Williams and Webb JJ. adhered to the view which they had expressed in *McCarter* v. *Brodie*,[97] but Webb J. said [98]: "Nothing has occurred to cause me to change the opinion I "formed in *McCarter* v. *Brodie*,[97] in the light of their Lordships' observations in *James* v. *The Commonwealth* [96] and the "*Banking* case,[94] although without the guidance afforded by "those observations as I understand them I would have come to "a different conclusion, as appears plainly enough in what I said "in *McCarter* v. *Brodie*,[99] and which is now recalled by Fullagar "and Kitto JJ."

Fullagar J. adhered to the contrary view which he had expressed in *McCarter* v. *Brodie*,[100] and he was supported by very cogent judgments from Kitto and Taylor JJ.

This historical survey has been long, but it fulfils three useful purposes. First, it shows the remarkable conflict of judicial

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[93] 80 C.L.R. 432.
[94] [1950] A.C. 235.
[95] 50 C.L.R. 30.
[96] [1936] A.C. 578.
[97] 80 C.L.R. 432.
[98] 87 C.L.R. 89.
[99] 80 C.L.R. 482.
[100] 80 C.L.R. 432.

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opinion manifested in the transport cases themselves and arising at a later stage on the question how far the reasoning of the majority in the transport cases was affected by the reasoning of the Board in the *Bank* case.[101] Secondly, it enables their Lordships to express their own view by borrowing language, upon which they cannot improve, from judgments of learned judges of the High Court. Thirdly, it shows what are the facts in the light of which the argument stare decisis must be considered.

The argument before their Lordships' Board turned chiefly upon the question whether or not the Transport Act could be regarded as being "regulatory" and therefore valid within the principles laid down in the *Bank* case.[101] Counsel for the respondents (supported by counsel for the interveners) laid great stress on a passage in the judgment in that case, already quoted, which contains the sentence[102]: "Every case must be judged on "its own facts and in its own setting of time and circumstance, "and it may be that in regard to some economic activities and at "some stage of social development it might be maintained that "prohibition with a view to State monopoly was the only practical "and reasonable manner of regulation, and that inter-State trade, "commerce and intercourse thus prohibited and thus monopolized "remained absolutely free."

Their Lordships will shortly make some brief observations upon this passage, but on the specific question before them whether or not the licensing provisions in the Transport Act contravene section 92 of the Constitution they are entirely in agreement with the view of the minority of the High Court and with the observations, quoted above, made by the Chief Justice in expressing his "personal opinion." They would gratefully adopt as their own these observations and, subject to a reservation about to be stated, the passages already quoted from the judgments of Dixon J. (as he then was) and Fullagar J. in *McCarter* v. *Brodie*.[103]

There are, however, some passages in the judgments of the Chief Justice and Fullagar J. in *McCarter* v. *Brodie*[103] which might be interpreted as necessarily condemning as invalid any licensing system under which an inter-State trader who could comply with all the regulations validly prescribed by law might be refused a licence. Their Lordships can imagine circumstances in which it might be necessary, e.g., on grounds of public safety, to limit the number of vehicles or the number of vehicles of certain types in certain localities or over certain routes, with the result that some applicants might be unable to obtain licences. Such a system might well be justified as regulatory.

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[101] [1950] A.C. 235.

[102] Ibid. 311.

[103] 80 C.L.R. 432.

In this connexion two passages from the judgment of Taylor J. in the present case may be set out since they would seem to be couched in terms sufficiently wide to cover the kind of contingency envisaged above. The first reads [104]: "For if the legislature "itself may not, without infringing section 92, assert a right, at "its absolute discretion, to permit or prohibit banking, it is, to "me, inconceivable that it may, without infringing section 92, "confer such a right upon a subordinate body. This, of course, "is very far from saying that trade and commerce may not be "made the subject of regulation either through the medium of "a licensing system or otherwise; nor does it deny the proposition "that regulation may include partial prohibition or prohibition "sub modo."

The second is where, after quoting from the judgment of Latham C.J. in *McCarter* v. *Brodie*,[105] he says [106]: "I under-"stand from these and other relevant observations of his Honour "that if the licensing authority had been invested with an "unlimited and arbitrary discretion, a conclusion that the legis-"lation infringed section 92 would have been inevitable, for such "legislation could not be regarded as regulatory. If this be so, "legislation of this character must infringe section 92 unless the "discretion to refuse a licence is limited to or confined within "the ambit constituted by those matters which should properly "be regarded as regulatory of the trade or commerce concerned. "For, I can see no relevant distinction between an arbitrary "discretion and one which, though not capable of being exercised "on any grounds at all, authorizes the licensing authority to "travel outside the field of regulation. This is the very activity "which is denied to the legislature itself and, that being so, any "enactment purporting to authorize a subordinate authority to "do so must be invalid.

"In my opinion, section 17 of the Act under review in this "case, even if it does not confer a complete and arbitrary autho-"rity to grant or refuse licences, does confer an arbitrary authority "to refuse licences on grounds other than those which may "properly be regarded as regulatory of the trade or commerce "concerned."

Their Lordships have thus adopted the unusual course of answering this important question not in language of their own but in the language of judges of the High Court of Australia. They do so for two reasons, first because they are in agreement with this language and see no reason to suppose that they can improve upon it; secondly because there is a very clear-cut division of opinion in *McCarter* v. *Brodie* [107] and in the instant case as to the effect, if any, of the judgment in the *Bank* case [108] upon the decision in *Vizzard's* case,[109] and their Lordships do not wish to leave any room for doubt, by any observations which they might make, that they agree with the views upon this point which have been expressed by the minority in each case.

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[104] 87 C.L.R. 110.

[105] 80 C.L.R. 432.

[106] 87 C.L.R. 112.

As to the passage in the judgment of the Board in the *Bank* case [110] upon which counsel for the respondents particularly relied, their Lordships accept without qualification everything that was said by the Board in the *Bank* case,[110] but they are not aware of any circumstances in the present case giving rise to the situation contemplated in that passage. As the case was decided on demurrer, no evidence was given on either side at the hearing, although certain documents were annexed to the respondents' defence. Consequently no facts were proved which might have enabled the respondents to base an argument on the passage in question.

Their Lordships were asked to apply the maxim stare decisis and on that ground to refuse to disturb the decision in *Vizzard's* case,[111] which had stood since 1933, had frequently been followed and had been followed yet again in *McCarter* v. *Brodie* [112] after the decision in the *Bank* case.[113] Reliance was also placed upon the observations of the Board on *Vizzard's* case [114] in *James* v. *Commonwealth of Australia.*[115] Their Lordships think it would be quite wrong to take this course, as the present appeal offered an opportunity to set at rest the remarkable conflict of judicial opinion already mentioned. They have already expressed their view that the decision in *Vizzard's* case [116] has never been approved by the Board and they think it would be wrong to attach weight, for the present purpose, to the fact that leave to appeal has been refused in certain cases. They find it quite impossible to take any other course than to express their disagreement with the views of the majority in *Vizzard's* case.[116]

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[107] 80 C.L.R. 432.
[108] [1950] A.C. 235.
[109] 50 C.L.R. 30.
[110] [1950] A.C. 235, 311.
[111] 50 C.L.R. 30.
[112] 80 C.L.R. 432.
[113] [1950] A.C. 235.
[114] 50 C.L.R. 30.
[115] [1936] A.C. 578
[116] 50 C.L.R. 30.

The result is that the first question posed at the beginning of this judgment must be answered in the affirmative.

The second question, what is the effect of section 3 (2) of the Transport Act, must now be considered. It was not suggested in argument that the provisions of the Act are invalid in so far as they apply to intra-State transport. In their Lordships' opinion the effect of section 3 (2) is that the Act must be read and construed as the appellant suggests, and the appellant is entitled to a declaration that the provisions of the Act requiring application to be made for a licence, and all provisions consequential thereon, are inapplicable to the appellant while operating its vehicles in the course and for the purposes of inter-State trade, or to the vehicles while so operated.

Their Lordships will humbly advise Her Majesty that the appeal should be allowed and a declaration made in the terms just stated.

The respondents must pay the appellant's costs here and in the High Court. There will be no order as to the costs of the interveners.

Solicitors: *Farrer & Co.; Light & Fulton; Coward, Chance & Co.; Freshfields.*

J. C.*
1955
Jan. 24.

COMMISSIONER OF INCOME TAX . . Appellant;

AND

H. BJORDAL . . . . Respondent.

ON APPEAL FROM THE COURT OF APPEAL FOR EASTERN AFRICA.

East Africa—Revenue—Income tax—Company—Undistributed profits—Exemption—Company "in which the public are substantially "interested"—"The public"—Distinguished from controlling interest—No implication from family relationship—Shareholder member of public becoming director—Income Tax Ordinance, No. 8 *of* 1940 *(Uganda) (as amended by section* 5 *of Ordinance No.* 11 *of* 1943), *s.* 21 (1), *proviso* (*b*), (2).

Revenue—Surtax—Company.

Section 21 (1) of the Income Tax Ordinance, 1940, of Uganda, as amended by section 5 of the Income Tax (Amendment) Ordinance, 1943, provides that the commissioner may, when the conditions stated in the subsection are satisfied, make an order that the undistributed portion of 60 per cent. of the total income of a company resident in the Protectorate shall be deemed to have been distributed as dividend amongst the shareholders and included in their total incomes for the purposes of assessment to tax. By proviso (*b*) to subsection (1) the subsection is not to apply to a company "in which the public are substantially interested." By subsection (2) a company is to be deemed to be one in which the public are substantially interested if shares carrying not less than 25 per cent. of the voting power have been allotted unconditionally to, or acquired unconditionally by, and held beneficially by, the public, and if any such shares have been in fact freely transferable by the holders to other members of the public.

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* *Present*: Lord Oaksey, Lord Tucker and Mr. L. M. D. de Silva.

In a company registered in Uganda the respondent, a shareholder and director, held 73·96 per cent. of the voting power, and his brother, also a director of the company, held 25·99 per cent. Five other persons held one share each—together ·04 per cent. of the voting power. The shares held by the respondent's brother had been purchased from the respondent for full value; it was not suggested that he was a nominee of the respondent, and there was nothing to show that he was acting in concert with the respondent as a shareholder or as a director. It was not disputed that the shares possessed by members other than the respondent had been allotted unconditionally to, and had been held beneficially by, them, and had been freely transferable:—

Held, it being common ground that the members of a company who were to be distinguished from the public for the purposes of section 21 were those who had control of the company by voting power, that for the purposes of this case 51, not 75, was the percentage of voting power requisite to confer a controlling interest in the company, and that accordingly the respondent had a controlling interest, and there being nothing to indicate that his brother was acting in concert with him he, the brother, must be regarded as a member of "the public" within the meaning of the subsection. Inasmuch, therefore, as the brother held shares commanding more than 25 per cent. of the voting power, the company was one in which "the public are substantially interested."

In the absence in the Ordinance of any provision from which control by a relative could be implied, relationship by itself afforded no sufficient reason for grouping relations together in the process of determining where the controlling interest resided.

Tatem Steam Navigation Co. v. *Inland Revenue Commissioners* [1941] 2 K.B. 194; 57 T.L.R. 622; [1941] 2 All E.R. 616 considered.

Shareholders in a company who are members of "the public" do not cease to be so because they become directors.

Judgment of the Court of Appeal for Eastern Africa affirmed.

APPEAL (No. 42 of 1953) from a judgment of the Court of Appeal for Eastern Africa (April 28, 1952) which reversed a decision of the High Court of Uganda (June 29, 1951) to the effect that Bjordal Mines Ld., a limited liability company registered in

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Uganda, of which the respondent was a shareholder and director, was not at the relevant time a company in which "the public "were substantially interested" within the meaning of section 21 of the Income Tax Ordinance, 8 of 1940, of Uganda.

Section 21 provided: "(1) Where the commissioner is "satisfied that in respect of any period for which the accounts "of a company resident in the Protectorate have been made "up, the profits distributed as dividends by that company "up to the end of the sixth month after the last date upon "which its accounts for that period are required by virtue of "the provisions of the Companies Ordinance, to be laid before "the company in general meeting, increased by any tax payable "thereon are less than sixty per cent. of the total income of the "company ascertained in accordance with the provisions of this "Ordinance for that period, he may, unless he is satisfied that "having regard to losses previously incurred by the company or "to the smallness of the profits made, the payment of a dividend "or a larger dividend than that declared would be unreasonable, "by notice in writing order that the undistributed portion of "sixty per cent. of such total income of the company for that "period shall be deemed to have been distributed as dividends "amongst the shareholders as at the said last date and thereupon "the proportionate share thereof of each shareholder shall be "included in the total income of such shareholder for the "purposes of this Ordinance:

"Provided that—(*a*) . . . (*b*) this subsection shall not apply "to any company in which the public are substantially interested "or to a subsidiary company of such a company if the whole "of the share capital of such subsidiary company is held by the "parent company or by the nominees thereof.

"(2) For the purpose of this section a company shall be "deemed to be a company in which the public are substantially "interested if shares of the company (not being shares entitled "to a fixed rate of dividend, whether with or without a further "right to participate in profits) carrying not less than twenty-five "per cent. of the voting power have been allotted unconditionally "to, or acquired unconditionally by, and are at the end of the said "period beneficially held by, the public (not including a company "to which the provisions of this section apply), and if any such "shares have in the course of such period been, in fact, freely "transferable by the holders to other members of the public."

Section 21 in the form in which it appears above was the result of a substitution effected by an amending Ordinance of

1943. In its original form it read: "21. Where it appears to the "commissioner that with a view to the avoidance or reduction "of tax a company controlled by not more than five persons has "not distributed to its shareholders, as dividend, profits made in "any period ending after the 1st day of January, 1939, which "could be distributed without detriment to the company's "existing business, he may treat any such undistributed profits "as distributed, and the persons concerned shall be assessable "accordingly."

At the relevant time 12,007 shares, some designated "A" shares and the others "B" shares, had been issued. The "A" shares were not transferable without the consent of the directors. The "B" shares were freely transferable. They carried equal voting rights. Of the 12,007 shares the respondent held 8,881 shares (7,632 "A" and 1,249 "B"). His brother, Sverre Hendrik Bjordal, held 3,121 "B" shares. Five other persons held one "B" share each. Thus the respondent held 73·96 per cent. of the voting power and Sverre Hendrik 25·99 per cent. The five others held the remaining very small percentage of ·04 (the decimal places beyond the second were not material and are not mentioned).

The 3,121 "B" shares held by Sverre Hendrik had been purchased from the respondent, his brother, for full value. It was not suggested that Sverre Hendrik was a nominee of the respondent, and there was nothing to show that he was acting in concert with the respondent as a shareholder or as a director.

The commissioner decided that Bjordal Mines Ld. was not a company in which the public were substantially interested as defined by section 21 (2) of the Ordinance, and the effect of that decision was that the respondent became liable to income tax on £3,580, the appropriate apportioned part of the income of the company for the year 1949 deemed to have been distributed to him as dividend.

The High Court of Uganda (Pearson J.), on appeal by the respondent, upheld the decision of the commissioner that the public were not substantially interested in the company. On further appeal by the respondent to the Court of Appeal for Eastern Africa (Nihill P., Worley V.-P. and Ainley J.) a reserved judgment was delivered unanimously allowing the appeal.

The Commissioner of Income Tax appealed.

1954. Nov. 25, 29. *John Senter Q.C.* and *Roderick Watson* for the appellant. The question, a short one, is, what does "the "public" mean in the context of the Uganda Income Tax Ordinance, 1940? Practically the whole point is whether Sverre Bjordal, the respondent's brother and a co-director with a substantial shareholding in the company, falls to be treated as a member of the public. It is not possible on section 21 of the Ordinance to lay down any pragmatic test of what "the public" consists. It is essentially a question of degree to a large extent, and as a general proposition, if one person or a small group of persons is found in a position of ultimate control of a company, then as a proposition of law that is not what the legislature meant by "the public." The distinction implied by the use of the expression "the public" in the context in which it occurs is between (i) those persons who, either solely or as members of a group bound to act in concert, are in control of the company, and (ii) other shareholders. Sverre Bjordal bought these shares not as an investing member of the public, but with a view to joining his brother in control of the company, and on the facts of this case the commissioner was justified in holding as he did. *Tatem Steam Navigation Co.* v. *Inland Revenue Commissioners* [1] justifies the view that in the present case the two brothers were in control of the company in their own interests. In the *Tatem* case [1] some guidance as to the meaning of "the public" is found in the section itself; the Ordinance here gives no such guidance, and the question is whether on a fair inference from the facts proved the trial judge was right. It is submitted that his decision was right.

In his judgment in the Court of Appeal Worley V.-P. stated that the present respondent, holding the majority of voting rights, could remove the directors at any time. That statement, it is submitted, is at variance with the provisions of section 118 of the Uganda Companies Ordinance and article 80 of the company's articles of association, inasmuch as under that article a director can be removed before the expiration of his period of office only by an extraordinary resolution which, under section 118, requires a majority of not less than three-quarters of the members of the company. The position in truth and in fact was that Sverre Bjordal, by virtue of his holding 3,121 out of the 12,007 issued shares, was in a position to "block" any extraordinary or special resolution of the company; could not be removed from his directorship without his consent; and was therefore, in terms of ultimate control, an indispensable member of the small group consisting

[1] [1941] 2 K.B. 194; 57 T.L.R. 622; [1941] 2 All E.R. 616.

of his brother and himself in a position to control the company, and was not therefore a member of "the public."

Roderick Watson following. The two sets of persons are the directors and the members of the company, and the special position of the directors may afford a test in itself, and the test here is one of fact having regard to all the circumstances. In considering the division of the members of a company into two classes the directors are not members of the public because of their special and particular position in relation to the releasing of the company's profits by way of dividends.

Heyworth Talbot Q.C. and *H. Major Allen* for the respondent. The word "public" in the ordinary usage of the English language means and includes all the members of the community. If, therefore, in this case any restriction is to be placed on its meaning, it can only be by necessary inference from the context in which it appears in section 21. No such inference can be drawn, unless it is that "the public" is contrasted with some person who, by reason of his voting power, is in a position to exercise control over the company's dividend distributions, or with some group of persons who have bound themselves to act in concert and are in a position to exercise such control. If such a contrast is to be drawn as regards this company it can only be between the respondent (who controlled 71,602 votes out of a total of 96,804) and the other shareholders, including Sverre Bjordal, who are therefore to be regarded as members of the public.

It is quite wrong to regard section 21 as sui generis; it is a descendant of a fairly long line, the ancestor of which is, of course, section 24 of the Finance Act, 1922, of the United Kingdom; and see also section 31 (3) of the Finance Act, 1927, where the language is almost the same as in the 1943 amendment of the Uganda Ordinance. It must be inferred that the Ordinance of 1943 was enacted in the light of the *Tatem* decision,[1] which has therefore a very special significance here, and ought to be regarded as a dictionary. In that case the court compared those controlling with the others and, having said that the controlling interest was outside the public, found that the others were "the public." That appears to be the only case in which the meaning of "the "public" has been considered. According to this code, the public are those who do not represent the controlling interest; that is what it comes down to. The test of finding first the controllers and then saying that the rest are "the public" may, however, be rather confusing because there are these two voting power percentage tests—51 for controlling interest, and the 25 specified in subsection (2) of section 21 to be held by the public as being necessary before the company is one in which the public are deemed to be substantially interested. If the Uganda legislation is regarded as following the English concept, and the controlling interest is 51 per cent. and not 75 per cent., then Sverre does not come into the picture. To give that a practical workability there must be the 51 per cent. in one individual or in two or more bound in concert to act together. It was said for the appellant that it may be difficult to define just where the line is to be drawn in a case like this, but that his case falls on the right side of it. If he is wrong, and the control is by a bare majority—51 per cent.—then there is no difficulty in this case at all; the respondent had over 51 per cent. and Sverre does not come into it. If, however, 75 per cent. is necessary, then admittedly Sverre is involved, and there is a quite different argument: if, say, Sverre and another hold 40 and 12 per cent. respectively, they are not taken unless they are bound in concert —they are otherwise all members of the public.

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[1] [1941] 2 K.B. 194.

The control conception in the Ordinance in its original form in 1940 was omitted from the Ordinance of 1943. "Members of "the public" in subsection (2) of section 21 goes to show that "the public" means members of the public. There is a very strong inference that the Uganda legislature was using those words in the sense in which they had been construed in England, where they had been defined by reference to the control test. There is no ground from which any distinction can be drawn between the meaning of controlling interest construed by the House of Lords in *British American Tobacco Co. Ld.* v. *Inland Revenue Commissioners* [2]—51 per cent.—and any kind of control that may be relevant for tax purposes. The first and primary argument, therefore, is that the respondent has 74 per cent. and therefore the control is in his hands and all other members of the company fall within the description "the public." The second and alternative submission is that if 75 per cent. is necessary, it must be shown that the control is in the hands of a single person or a group of persons who are bound to act in concert, and that has not been established on the facts here. The control of the company was in the hands of the respondent alone. Sverre Bjordal and the five other shareholders who together held beneficially shares in the company carrying not less than 25 per cent. of the voting power, which shares had been unconditionally acquired by them and were freely transferable by them, were all members of the public.

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[2] [1943] A.C. 335; 59 T.L.R. 91; [1943] 1 All E.R. 13.

Lastly, it was said for the appellant that a person who is a director of a company—as Sverre is—is not to be regarded in relation to that company as a member of the public. There is, however, nothing in the present statute or in any of its predecessors to suggest that directorship is in any way relevant. If the contrary had been intended it would have been easy for the legislature to have said so.

Senter Q.C. in reply. The existence of a directorship is only one of the factors—it is not put higher than that. If the appellant is right about the 75 per cent., no one other than Sverre could have added the necessary balance—the other five could not have done it. With regard to controlling interest, the *British American Tobacco* case [2] turned on the meaning of the words in the context in which they were used; Viscount Simon L.C. took the view that a bare majority was sufficient for that purpose. [Reference was also made to the *Tatem* case.[3]] It is doubtful whether the English Acts are of any assistance in construing the Ordinance of 1943, because there are so many differences; the Finance Act, 1936, s. 19, e.g., emphasizes the extraordinary elaboration of the English legislation compared with the Ordinance of 1943. Assuming that it is right that 75 per cent. means control, only the respondent and Sverre together had control of this company.

1955. Jan. 24. The judgment of their Lordships was delivered by Mr. L. M. D. DE SILVA, who stated the facts and statutory provisions set out above, and continued: It will be seen that when the conditions stated in subsection (1) of the existing section 21 are satisfied the commissioner has the power to make an order under which the undistributed portion of 60 per cent. of the total income of a company for a period specified in the subsection is notionally to be regarded as having been distributed, and the "proportionate share thereof of each share-"holder" is to be regarded as having been received by the shareholder for purposes of assessing the amount of income tax payable by him. Clause (*b*) of the proviso to the subsection takes away the power of the commissioner to make such an order with regard to a company "in which the public are "substantially interested."

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[2] [1943] A.C. 335.

[3] [1941] 2 K.B. 194.

Subsection (2) of section 21 lays down a set of conditions upon the satisfaction of which a company is to be "deemed" to be one in which the "public are substantially interested." The question for decision by their Lordships is whether Bjordal Mines Ld. satisfies the conditions laid down in subsection (2).

The difficulty in deciding this question lies in the words "the public" appearing in the subsection. There is no definition of this term in the Ordinance. Section 21 of the English Finance Act, 1922, similar in object to the Uganda statute under consideration, contains a reference in terms to "control" of a company by an individual or individuals, and the words "the public" which occur in the English Act have been understood as meaning all persons other than the controlling individual or individuals (*Tatem Steam Navigation Co.* v. *Inland Revenue Commissioners*[1]). There is no such reference to "control" in the existing statute law of Uganda, although the original section 21 of Ordinance 8 of 1940 (vide above) now repealed, did contain a reference in terms to "control."

In the main argument before their Lordships both sides proceeded on the basis of a view expressed by the trial judge (Pearson J.) and accepted to a substantial extent by the Court of Appeal. The trial judge said: "I think the members of a company who are to be distinguished from the public for the "purposes of this section are those who have control of the "company by voting power."

It was common ground that it was necessary first to decide which member or group of members possessed a controlling interest. It was agreed that the remaining members were members of "the public" within the meaning of subsection (2). Their Lordships were invited to decide in which member or group of members of Bjordal Mines Ld. the controlling interest resided.

It was argued for the appellant that a member or group of members of a company could be said to have a controlling interest only if they commanded 75 per cent. or more of the total voting power. It was said that the respondent did not possess the requisite percentage of voting power as he possessed only 73·96 per cent., but as the respondent and Sverre together possessed over 75 per cent., and as no other combination of shareholders possessed over 75 per cent., the respondent and Sverre together must be held to have the controlling interest. If this argument were correct then, as the respondent and Sverre held between them over 99 per cent. of the shares, 25 per cent. could not be held by the public, and the company could not under subsection (2) be deemed to be one in which the public were substantially interested.

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[1] [1941] 2 K.B. 194.

It was argued for the respondent that in order to have a controlling interest the requisite percentage was 51 or over. That as the respondent alone possessed this percentage no other member or group of members could possess the requisite percentage and that, therefore, in the absence of concerted action between the respondent and any other member, the respondent by himself must be held to have a controlling interest. If this argument be correct, then as the shares of the other members carried more than 25 per cent. of the voting power the company must be held to be one in which the public were substantially interested within the meaning of subsection (2) of section 21.

It was not disputed that the shares possessed by members other than the respondent had been " allotted unconditionally to " or acquired unconditionally by " those owning them, that at the end of the relevant period they had been " held beneficially " by those owners and had been " freely transferable " by the owners as stipulated by subsection (2) of section 21.

Both the appellant and the respondent agree that the chief factor determining the question where the controlling interest resides is percentage of voting power, although they are not agreed as to what figure of percentage is requisite for the purpose.

For the purposes of a decision upon the arguments addressed to them their Lordships are of opinion that 51 should be adopted as the figure of percentage requisite to confer a controlling interest. A member or group of members holding 51 per cent. of the voting power would succeed in fulfilling his or their wishes with regard to the ordinary resolutions which come up before meetings of shareholders. They would generally have a dominant voice in the election of directors when such elections fell due. Although they would not be able without support from others to secure the passing of a special resolution, nevertheless they would be able to resist a special resolution which was not in accordance with their wishes. They would be able generally to control the company, though their capacity to do so would not be as ample as that accompanying the possession of 75 per cent. of the voting power. The fact that the ability to control enjoyed by an individual or group holding 51 per cent. of the voting power is limited in some ways does not persuade their Lordships that the requisite percentage is 75.

There is another consideration directly connected with section 21 which points to 51 being the correct figure of percentage. By subsection (2) of section 21 the legislature appears to have created a category of companies which, despite the existence of a controlling interest, are, by reason of compliance with its provisions, excluded from the operation of subsection (1). If the argument of the appellant is correct the controlling group (or individual) must have (*a*) 75 per cent. of the voting power or (*b*) over 75 per cent. of the voting power. In case (*b*) the provisions of subsection (2) cannot be complied with as the 25 per cent. of the voting power required to be held by others does not exist. Consequently there is only one case which will fall into the category, namely, the case in which the controlling interest is constituted by exactly 75 per cent. of the voting power. It is improbable that the legislature enacted a subsection to provide for this one solitary case.

Upon the arguments addressed to their Lordships they are of opinion that the respondent must be held to have a controlling interest. If any of the other shareholders had been shown to have been acting in concert with the respondent they would, with the respondent, have fallen into a group holding the controlling interest. The remaining shareholders would have been members of " the public." There is nothing to indicate that Sverre was acting in concert with the respondent. He must therefore be regarded as a member of " the public " within the meaning of the subsection.

The fact that Sverre is a brother of the respondent was pointed out as a reason why Sverre and the respondent should be regarded as a group in combination and not as two separate individuals in respect of their holdings of shares. Their Lordships are unable to accede to this suggestion. They do not think that relationship by itself affords a sufficient reason for grouping relatives together in the process of determining where the controlling interest resides. They are supported in this view by the decision in *Tatem Steam Navigation Co.* v. *Inland Revenue Commissioners.*[2] In that case the principal shareholder had given to his niece the greater part of the shares held by her and it was contended, on the ground of relationship among other grounds, that the niece could not be regarded as holding these shares independently of the principal shareholder. Rejecting the argument Scott L.J. said [3]: " I cannot understand why the fact " that she was a niece, or that it was a gift, or that it was for the " purpose of her marriage settlement, makes any difference at " all." He went on to say that there was no implication of control by a relative except where such implication arose under the special statutory provision made by the English Act in respect of certain relatives. There is no similar statutory provision in the Uganda Ordinance under consideration.

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[2] [1941] 2 K.B. 194.

Sverre held shares commanding more than 25 per cent. of the voting power and consequently it must be held that Bjordal Mines Ld. is a company which complies with the provisions of subsection (2) and therefore is a company in which " the public " are substantially interested."

It was said in the course of the argument that if the requisite percentage of voting power is not held by one individual but held by more than one individual, a controlling interest cannot be said to arise unless it is shown that the individuals who together hold the requisite percentage are acting in concert. In the case before their Lordships over 51 per cent. of the voting power was held by the respondent, a single individual, and consequently the question does not arise. Their Lordships express no opinion upon the questions which would arise when the requisite percentage is not held by a single individual but only by a group, or by overlapping groups, of individuals.

The appellant also argued that neither the respondent nor Sverre could be regarded as members of " the public " as they were directors of the company. It is clear that members of " the public " within the meaning of the section are shareholders in the company. Their Lordships can find no reason for holding that shareholders cease to be members of " the public " because they have become directors.

For the reasons which they have given their Lordships will humbly advise Her Majesty that the appeal be dismissed. The appellant must pay the respondent the costs of this appeal.

Solicitors: *Charles Russell & Co.; Hale, Ringrose & Morrow.*

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[3] [1941] 2 K.B. 194, 202.

[HOUSE OF LORDS.]

H. L. (E.)*

1954
Oct. 18, 19,
20.
1955
Jan. 20.

RICHARD THOMAS & BALDWINS LD. . APPELLANTS;

AND

CUMMINGS . . . . RESPONDENT.

Factory—Dangerous machinery—Fencing—Transmission machinery—Dangerous parts—Duty to fence when "in motion or in use"—Machine being adjusted and without electrical motive power—Motion provided by hand—Whether machine in motion—Factories Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 67), *ss.* 12, 13, 14, 16.

By sections 13 (1) and 14 (1) of the Factories Act, 1937, every part of transmission machinery and every dangerous part of any machinery other than prime movers and transmission machinery, "shall be securely fenced unless it is in such a position or of such "construction as to be as safe . . . as it would be if securely "fenced." By section 16: "All fencing or other safeguards . . . "shall be . . . maintained and kept in position while the parts "required to be fenced or safeguarded are in motion or in use, "except when any such parts are necessarily exposed for examination and for any lubrication or adjustment shown by such "examination to be immediately necessary. . . ."

A fitter employed in a factory was injured while helping another workman to make adjustments in an electric power-driven grinding machine. The motive power had been cut off and when it became necessary, in order to rotate the face plate, for the purpose of carrying out the work on which he was engaged, he pulled on one of the belts through which electric power was normally transmitted. In so doing he crushed his finger between the belt and a pulley. He sued his employers for damages, alleging breach of statutory duty:—

Held, that at the time of the accident the machinery was not "in motion or in use" within the meaning of section 16, but for repair, and accordingly there was then no obligation to fence it and no breach of statutory duty.

Per Lord Oaksey. A machine is not "in motion" within section 16 if it is not in motion for the purposes for which it was intended.

Per Lord Porter and Lord Tucker. A machine is not "in "motion" when it is turned by hand and there is no motion in the prime mover.

Per Lord Reid and Lord Keith of Avonholm. "In motion" imports a continuing state of motion lasting or intended to last an appreciable time.

Decision of the Court of Appeal (sub nom. *Cummings* v. *Richard Thomas & Baldwins Ld.*) [1953] 2 Q.B. 95; [1953] 2 All E.R. 43 reversed.

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* *Present*: LORD OAKSEY, LORD PORTER, LORD REID, LORD TUCKER and LORD KEITH OF AVONHOLM.

APPEAL from the Court of Appeal (Singleton and Hodson L.JJ., Morris L.J. dissenting).

This was an appeal from an order of the Court of Appeal dated April 24, 1953, dismissing an appeal by the appellant company, Richard Thomas & Baldwins Ld., from a judgment of Pearson J. dated November 26, 1952, in favour of the respondent, William Cummings, for £325 with costs to be taxed.

The facts, set out in paragraphs 2 to 4 of the printed case of the appellant company on the appeal to the House of Lords, were as follows: "(2) The respondent's claim was for damages for "personal injuries sustained on February 12, 1951, whilst working "as a fitter in the appellants' works at Ebbw Vale, Monmouth- "shire. At the time of the accident the respondent was about "50 years of age and had been employed by the appellants for "about 14 years, for the last eight to ten years of which he had "been employed as a fitter and at the time of the accident was "earning about £10 per week.

"(3) In the appellants' premises at Ebbw Vale is a machine "known as a Waldrich grinding machine which is used for grind- "ing large and small rollers employed in the rolling of steel sheet. "The machine is about 25 feet long and is driven by an electric "motor, whose motive power is transmitted from a pulley on "the motor, to a pulley on the machine by four belts riding in "grooves in the pulleys. The distance between the centres of "the two pulleys is 3 feet 3 inches, and the length of belting "clear of the pulleys is 2 feet 6 inches. The belts and pulleys "are entirely enclosed by a metal casing bolted to the floor. . . ." (Photographs were put in evidence which showed the construction of the machinery.) "Some time prior to the accident it was "decided to fix a new drive to one of the rollers of the machine. "This could not be done without stripping down the machine and "removing the casing. All power was therefore cut off from the "machine, the machine stripped down and the casing removed. "The machine had been in this condition and incapable of use "for a period of six weeks prior to the accident. On February 12, "1951, the respondent was instructed to drill two holes in the "face plate of the machine. This was part of the work connected "with the proposed alterations to the machine. This work did "not involve the restoration of motive power and at no time "was there any motive power connected to the machine. The "respondent was assisted in his work by his mate, who was also "a fitter, and another man. After setting up a pneumatic drill

H. L. (E.)

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RICHARD THOMAS & BALDWINS LD. *v.* CUMMINGS.

"on a fixed pillar beside the face plate, the respondent moved "the face plate into position for drilling the first hole, by pulling "on the belts connecting the motor with the machine. He then "drilled the first hole. After that it was necessary to move the "face plate 180 degrees to bring it into position for drilling the "second hole by again pulling on the belt. The respondent did "the pulling while his mate . . . watched the face plate so as "to tell the respondent when the face plate was in the right "position. The respondent was pulling on the top side of the belt "from left to right, i.e., away from the machine down towards "the motor (which of course was not connected to any power or "capable of working). He pulled several times (he did not know "how often) without mishap, but then when he pulled again his "hand went too far and the fingers of his left hand became caught "between the belt and the pulley wheel on the motor and the "little finger of his left hand was injured and had subsequently to "be amputated above the proximal interphalangeal joint. The "accident occurred because instead of grasping the belt at the "top (when he could have pulled for 2 feet 6 inches or so) he "grasped it in the middle and started his pull from that point "(which was of course nearer the bottom pulley) and did not "remove his hand before it reached the bottom with the result "that it was caught between the pulley and belt.

"(4) The writ was issued on January 4, 1952, and by it "the respondent claimed damages for negligence and breach of "statutory duty. . . ."

H. I. Nelson Q.C. and *Thomas Roche* for the appellant company. The Factories Act, 1937, does not apply at all to machinery not driven by mechanical power, and this grinding machine was not, properly speaking, machinery until it was connected to the power. The question raised by this case is whether the Act refers to machinery not being in fact driven by mechanical power. The earlier Factories Acts of 1878 and 1901 only related to machinery driven by such power. In answering the question what machines the Acts relate to, reliance is placed on *Parvin* v. *Morton Machine Co. Ld.*,[1] which indicates how the present Act should be interpreted, i.e., in the light of the previous Acts, and that the courts should lean against revolutionary changes unless the words used compel such an interpretation. Sections 5 and 7 of the Factory and Workshop

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[1] [1952] A.C. 515; [1952] 1 T.L.R. 682; [1952] 1 All E.R. 670.

Act, 1878, show that the machinery subject to the safety regulations was only machinery driven by mechanical power.

The Act of 1937 makes no express provision for the case of the repair of a machine in such circumstances as the present. If the judgment of the Court of Appeal is right in its construction of section 16, a person who wishes to make necessary repairs to his machine must inevitably commit an offence, for sections 15 and 16 afford him no protection. Repairs could not have been carried out in this case with the guard in position.

As to what machinery was within the contemplation of the legislature see the definition of "mill-gearing" in section 96 of the Act of 1878 and also sections 61 and 99. In the Act of 1901 see sections 13, 19 and 105 and the definition of "machinery" and "mill-gearing" in section 156 (1). See also section 17 of the Act of 1937 and the definition of "factory" in section 151 (1) and also section 17. The situation remains unchanged throughout, the Acts applying only to machinery driven by mechanical power. *Wrigley* v. *Bagley & Wright* [2] and *Willmot* v. *Paton* [3] suggest that anything worked by hand-power is not within the relevant provision.

Sections 12 to 16 of the Act of 1937 provide the code as to fencing. This Act in essence repeats the Act of 1901 and its construction is the same. The machinery here in question was not "transmission machinery" within section 13, for when the movement was made it was not being mechanically propelled. When it was so propelled the section was complied with, for it was then securely fenced. That being so, the question arises: when must the fence be kept in position? The guard may be taken off in some circumstances when the machine is running; see section 16, and compare it with section 10 (1) (*d*) of the Act of 1901. It cannot be intended that the guards should never be taken off when the machine is stationary and the power is cut off. See also Operations at Unfenced Machinery Regulations, 1938 (S.R. & O. 1938, No. 641) and Operations at Unfenced Machinery (Amended Schedule) Regulations, 1946 (S.R. & O. 1946, No. 156). "In motion" in section 16 means while the machine is running and is being driven by the means by which it is designed to be moved, and the expression does not relate to the motions which a fitter must make in adjusting the machine when the power is cut off.

Parvin v. *Morton Machine Co. Ld.*[4] indicates that so far as the relevant matters are concerned, there is no difference between the provisions of the Act of 1901 and that of 1937. It also shows that this Act must not be read in a strictly literal fashion. The sections must be looked at as a whole to see their purpose, and ambiguities must be interpreted accordingly. Thus it is wrong to read the words "in motion" as covering the form of motion in the present case: see also *Carroll* v. *Andrew Barclay & Sons Ld.*[5]

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[2] [1901] 1 K.B. 780, 781, 782.

[3] [1902] 1 K.B. 237; 18 T.L.R. 48.

[4] [1952] A.C. 515, 520; 1950 S.C. 371, 373, 378, 379–80, 381.

Further, the respondent was guilty of contributory negligence and his injury was caused by his own fault. The test of negligence is objective.

As to the standard to be applied in assessing negligence, see *Caswell* v. *Powell Duffryn Associated Collieries Ld.*[6] and *Thurogood* v. *Van den Berghs & Jurgens Ld.*[7]

Thomas Roche following. Section 17, referring to machines intended to be driven by "mechanical power," provides a contrast with the terms of the sections here in question read in conjunction with the definitions of "prime mover" and "transmission machinery" in section 152 (1). Here the transmission machinery was not "in use." What was in use was the pulley pulled by hand. The motion transmitted was not that of a prime mover but of a hand.

Marven Everett Q.C. and *R. Geraint Rees* for the respondent. It is quite inaccurate to say that the fencing sections of the Act of 1937 only apply to machinery worked by mechanical power—power-driven machinery. Part II of the Act is dealing not only with prime movers and transmission machinery but also with "other machinery"; it is not limited to power-driven machinery. The machinery here in question was transmission machinery. It was in motion. It was not fenced. There is no provision in the Act which provides an escape clause and so prima facie there was a breach of sections 15 and 16. If this was not transmission machinery it was dangerous machinery within section 14. Further, on a correct view of the evidence, there was common law negligence by the appellant company.

In *Redgrave* v. *Lloyd & Sons Ld.*[8] the main argument for the appellant company was foreshadowed and was not accepted.

In the Act of 1901, there was a change in the pattern of the legislation on this topic: section 10 (1) (*d*) and (*c*). Section 79 was also new. With section 10 (1) (*d*), compare sections 15 and 16 of the Act of 1937. The power to make regulations is contained in section 60 (1) of the Act of 1937. The Operations at Unfenced Machinery Regulations, 1938, came into force on August 1, 1938, almost immediately after the Act of 1937 on July 1, 1938. It is not really an insuperable difficulty to say that if the Act applies to machinery other than machinery driven by power it will be impossible to repair it, for the Minister has been given power to make provision for that situation (see section 60 (2) (*c*)). As to the protection of young persons in relation to dangerous machinery, see section 21 of the Act and the Schedule to the Dangerous Machines (Training of Young Persons) Order, 1938 (S.R. & O. 1938, No. 485).

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[5] [1948] A.C. 477; 64 T.L.R. 384; [1948] 2 All E.R. 386.

[6] [1940] A.C. 152, 166, 174; 55 T.L.R. 1004; [1939] 3 All E.R. 722.

[7] [1951] 2 K.B. 537; [1951] 1 T.L.R. 557; [1951] 1 All E.R. 682.

[8] [1895] 1 Q.B. 876–9.

The pattern of the legislation is entirely consistent with (1) widening the protection afforded to factory workers against injury by machinery of any kind, and (2) widening the powers of the appropriate department to provide for situations such as repair and inspection. The whole object of the legislation is to reduce accidents in industry and its provisions should always be construed with that in mind. "Motion" and "use" may have different meanings according to the context. "Use" includes "motion," and "motion" here is deliberately used to cover any kind of motion. The relevant motion in which the legislature was interested is motion which may interfere with safety and cause injury or death. There is a breach of the statutory duty to fence save where the motion is of such a character and degree that it cannot hurt anyone. This part of the transmission machinery was at the relevant time in motion. As to the duty to fence, see regulations 1, 5 and 6 of the Regulations of 1938.

The absolute duties imposed by sections 12, 13 and 14 of the Act can only be relaxed by regulations made under the Act. *Nash* v. *High Duty Alloys Ld.*[9] does not help the respondent's case, but indirectly it indicates that those absolute duties cannot be otherwise escaped: see also sections 130 and 137 of the Act of 1937. As to statutory duty, see *National Coal Board* v. *England.*[10]

Parvin v. *Morton Machine Co. Ld.*[11] does not help the case for the appellant company. In so far as it is relevant it helps the respondent's case because it draws a distinction, in connexion with the statutory duty, between the factory machinery and the machinery which is a product of the factory. Here one is dealing, not with the product, but with machinery which is an integral part of the factory. *Thurogood* v. *Van den Berghs & Jurgens Ld.*[12] is no more than an application of the same principle.

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[9] [1947] K.B. 377; 63 T.L.R. 146; [1947] 1 All E.R. 363.

[10] [1954] A.C. 403; [1954] 1 All E.R. 546.

[11] [1952] A.C. 515.

The evidence indicates that the shifting of the machinery by the fitters by pulling on the belts was very common, and this illustrates the importance of construing the words " in motion " in a wide sense, as otherwise a very frequent operation which always produced risk of injury would be without statutory protection. Further, it establishes that the appellant company was guilty of common law negligence in allowing that to go on because it exposed the fitters to unnecessary risk of injury: see *Harris* v. *Brights Asphalt Contractors Ld.*[13] and *Smith* v. *Charles Baker & Sons*[14] as to unnecessary danger.

R. Geraint Rees following. For express references to machinery driven by mechanical power, see sections 17 and 139 of the Act of 1937. In the Dangerous Machines (Training of Young Persons) Order, 1938, made under section 21, some machines are described in the Schedule differently from others by reference to mechanical power. There is no difficulty in finding apt words to describe a machine by reference to the power which operates it. In section 20 the words " any moving part " refer to any type of motion which exposes the person employed to risk of injury. The evidence shows that this was a machine intended to be moved either by mechanical power or hand power according to the operations performed.

Nelson Q.C. in reply. As to section 20, it is clear from its concluding words that the machine contemplated is moving under power. The terms of the Acts from 1878 onwards show clearly that they were only meant to relate to such machinery. The Act of 1878 referred only to prime movers, as they would now be called, and transmission machinery, and the original protection afforded by it did not cover other machinery. In the Factory and Workshop Act, 1891, section 6 (2), the addition of " all dangerous parts of the machinery " was intended to cover machinery moving under power. The enactment of 1901 was in almost identical terms. By section 79 of that Act provision was made for regulations in respect of other kinds of machinery should they prove to be dangerous.

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[12] [1951] 2 K.B. 537.

[13] [1953] 1 Q.B. 617; [1953] 1 All E.R. 395.

[14] [1891] A.C. 325, 362; 7 T.L.R. 679.

Parvin v. *Morton Machine Co. Ld.*[15] and *Carroll* v. *Andrew Barclay & Sons Ld.*[16] were not cited as being like the present case but because they show that the words "any machinery" are not to be read literally but must be interpreted in their context.

The Act of 1937 contains no provision for repair. As to the difference between repair and maintenance see *London & North Eastern Railway Co.* v. *Berriman.*[17]

Their Lordships took time for consideration.

1955. Jan. 20. LORD OAKSEY stated the facts and continued: The appellants' premises were a factory within the meaning of the Factories Act, 1937, and the duties alleged to have been breached were those imposed by sections 13, 14 and 16 of that Act, the material parts of which and of section 152 it is convenient to set out.

Section 13 (1) as to transmission machinery: "Every part "of the transmission machinery shall be securely fenced unless "it is in such a position or of such construction as to be as safe "to every person employed or working on the premises as it "would be if securely fenced."

Section 14 (1) as to other machinery: "Every dangerous "part of any machinery, other than prime movers and trans-"mission machinery, shall be securely fenced unless it is in such "a position or of such construction as to be as safe to every "person employed or working on the premises as it would be if "securely fenced."

Section 16 as to construction and maintenance of fencing: "All fencing or other safeguards provided in pursuance of the "foregoing provisions of this Part of this Act shall be of sub-"stantial construction, and constantly maintained and kept in "position while the parts required to be fenced or safeguarded "are in motion or in use, except when any such parts are "*necessarily exposed for examination* and for any lubrication or "*adjustment* shown by such examination to be immediately "necessary, and all such conditions as may be specified in regula-"tions made by the Secretary of State are complied with."

Section 152 (1) as to general interpretation: " . . . "'Machinery' includes any driving-belt: . . . 'Prime mover'

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[15] [1952] A.C. 515.

[16] [1948] A.C. 477.

[17] [1946] A.C. 278; 62 T.L.R. 170; [1946] 1 All E.R. 255.

"means every engine, motor or other appliance which provides "mechanical energy derived from steam, water, wind, electricity, "the combustion of fuel or other source: . . . 'Transmission "'machinery' means every shaft, wheel, drum, *pulley*, system "of fast and loose pulleys, coupling, clutch, driving-belt or other "device by which the motion of a prime mover is transmitted "to or received by any machine or appliance: . . ."

Three questions have been argued in your Lordships' House, first, whether the appellants were guilty of a breach of the statutory duty imposed by section 16 constantly to maintain and keep in position the fencing while the part required to be fenced was in motion or in use; secondly, whether, if not, the appellants were guilty of negligence at common law; and thirdly, whether the respondent was guilty of contributory negligence.

Upon the second and third questions I see no reason to differ from the judgments of the courts below.

The first question is, however, a question of importance.

Pearson J. held that the pulley blocks and the pulley belt in between them were transmission machinery; that they were not necessarily exposed within the meaning of section 16; that they were in motion at the time of the accident unfenced, and that therefore the appellants were guilty of a breach of section 16. Singleton L.J. agreed that the machinery was transmission machinery or, if not, dangerous machinery, and rejected the appellants' argument that sections 13 to 16 only refer to movement by mechanical energy as opposed to movement by hand. He therefore dismissed the appeal. Hodson L.J. agreed in the result and that the machinery was transmission machinery and that the sections in question did not refer only to movement by mechanical energy. Morris L.J. dissented on the ground that the transmission machinery was not in motion because no transmission was taking place from a prime mover.

In my opinion the appeal must succeed.

Whether or not this machinery was transmission machinery when unconnected with a prime mover, it was clearly a dangerous part of other machinery within section 14 and therefore must be fenced. But the question, in my view, depends upon the true construction of section 16, and on that I am of opinion that the belt and pulley in question were not "in motion or in use" at the time of this accident, within the meaning of section 16. They were not "in motion or in use" for the purposes for which they were intended, but for repair, and, in my opinion, section 16 does not prohibit the removal of fencing when such removal is necessary for repair. Any other construction of section 16 would prevent altogether the repair of dangerous machinery wherever such repair was not shown to be "immediately necessary," unless such repair could be carried out without removing the fencing, and there must be innumerable parts of dangerous machinery which cannot be repaired without fencing being removed and without some movement being made therein.

The words of the exception in section 16 are expressly confined to occasions "when any such parts are necessarily "exposed for examination and for any lubrication or adjustment "shown by such examination to be immediately necessary." It is not without significance that the word "repair" which had occurred in section 10 (1) (*d*) of the Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), was omitted from section 16 of the Act of 1937, and it is clear, in my opinion, that section 16 only excepts examination and adjustment if immediately necessary whilst the machinery is in normal motion or use but does not except repairs which are not immediately necessary which, therefore, cannot be carried out whilst the machinery is in normal motion without the fencing. The words "in motion or in use" in section 16 do not, in my opinion, refer to such movement of machinery by hand as took place in the present case, and section 16 does not deal in any way with such movement. There is, therefore, no statutory prohibition which makes it obligatory to keep fencing in position when machinery is being repaired and is only being moved in so far as is necessary for the repair. It follows that, in my opinion, there was no breach of duty in the present case, and the appeal must be allowed.

The respondent must pay the costs in the courts below but there will be no order as to costs in your Lordships' House.

LORD PORTER. My Lords, William Cummings was an employee of the appellants as a fitter and on February 12, 1951, in the course of that employment was injured as a result of his left hand being caught between the belts of a grinding machine and the pulleys round which they revolved.

Normally the belts and pulleys are enclosed in a complete cover which prevents any possibility of such an accident, but on the occasion on which the accident in question happened the machine had been dismantled and this cover had been removed in order that repairs might be effected. The belt and pulleys were installed in order to drive what is known as a face plate which is rotated in the course of the machine's use. The machine itself, being under repair, had not been in use for some six weeks before the accident. In the course of the repair it became necessary to turn the face plate through an angle of 180 degrees in order to drill two holes in it opposite to one another, and in order to effect this turn the respondent took hold of the belt and pulled the face plate round. In doing so his fingers slipped between the belt and rollers with the result that they suffered injury.

For this injury the respondent sued the appellants, alleging that they were negligent at common law and in breach of their statutory duty under sections 13 or 14 of the Factories Act, 1937, and of section 16 of the same Act. The relevant sections are in the following terms: [His Lordship recited sections 13 (1), 14 (1) and 16, and the definitions of "machinery," "prime mover" and "transmission machinery" in section 152 (1) and continued:] My Lords, so far as common law negligence is concerned I am in agreement with both the courts which have already considered the case and, in common with the rest of your Lordships, am of opinion that no such negligence has been established. For many years the covers of these machines have been taken off from time to time for the purpose of effecting repairs, and no instance of a similar accident has been suggested. Nor, to my mind, would such an accident be anticipated. It has, indeed, been urged that the respondent was himself in fault inasmuch as his injury was caused by his own negligence. Having regard to the opinion I hold, it is not necessary to decide this point, but, as at present advised, I am inclined to agree with the courts below that it was inadvertence rather than negligence on the respondent's part which led to the accident.

The matter at issue is accordingly narrowed to the question whether there was a breach of statutory duty on the appellants' part. For this purpose it does not matter whether the machinery in question is "transmission" under section 13 or "dangerous" under section 14. It was argued on behalf of the appellants, that it was not the former because it was not being mechanically propelled at the time when the movement was made. I see no reason for so confining the expression "transmission machinery," nor is such a limitation of meaning warranted by the wording of the definition. It was, I think, transmission machinery and therefore required to be fenced under section 13. Furthermore, under section 16 the fencing had to be maintained and kept in position whilst the fenced parts were "in motion or in use." It was not, however, contended that at the relevant time they were in use, and therefore the only question which remains is whether at the moment at which the accident occurred they were in motion within the meaning of the section.

To the extent to which they were being moved they were in a sense in motion, but it does not follow that the words of the section include every kind of movement. Some assistance may, I think, be obtained first by the collocation of the words "in use or in "motion." "In use" would certainly mean running as it was meant to run and doing the work it was meant to do. But provision is required for cases where it was running as it was meant to run but not doing the work it was meant to do. In such a case it would, in my view, be in motion but not in use. The addition of the words "in motion" is accordingly required to cover such a set of circumstances, but one would not normally say that the machine was in motion when someone turned it over by hand for the purpose of effecting a repair or some similar purpose. This view is strengthened when it is found that no provision is contained in the Act enabling fencing to be removed for the sake of repair. In such a case they may be in movement but not in motion. If it were not so and if the judgment of the Court of Appeal were to prevail, they could only be uncovered for repair if they were kept motionless.

It is difficult to see why so complete a prohibition against uncovering the transmission machinery should be required when full working or motion are permitted in the case of examination, lubrication or adjustment. It may be that by means of some intricate or complicated machinery repairs might be effected though the machinery was still fenced, but such a requirement is, as I think the evidence establishes, impracticable in use and far-fetched in theory. Moreover, it has to be remembered that by section 10 (1) (*d*) of the Act of 1901 the necessity for maintaining the fencing of the machinery whilst in motion was abrogated whilst it was "under repair or under examination in connexion "with repair." That provision was excluded from the Act of 1937 not, I think, with the result of making repair impossible unless the machine was at rest, but because it was felt that repair should not be permitted whilst it was running in its normal manner, whether driving its ordinary load or not. In the present case it was not working in its normal way but merely being turned over in order to effect the necessary repair. Such movement does not, in my opinion, constitute being in motion within the meaning of the statute.

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Accordingly, in my opinion, the action fails and the appeal should be allowed.

LORD REID. My Lords, the respondent was injured whilst assisting in the adjustment of the position of the face plate of a grinding machine so that a hole could be drilled at a particular point on it. This machine when in use in the ordinary way was driven by belts passing over a large pulley on the machine and a smaller pulley on an electric motor, and the belts and pulleys were fenced by a substantial cover over them which was bolted to the floor. For a considerable time before the accident the machine had been under repair. The cover had been removed, but the belts were still in position and the pulley was still geared to the face plate, so the face plate could be turned by pulling the belts. The respondent was pulling the belts to bring the face plate into position when his fingers were caught between the belts and one of the pulleys.

I have no doubt that these belts and pulleys were "trans-"mission machinery" within the meaning of section 13 of the Factories Act, 1937, and I can find no support for the appellants' argument that the Factories Act only applies to machinery driven by mechanical power. The real question is as to the proper interpretation of section 16 of the Act. That section requires that fencing shall be constantly maintained and kept in position while the parts required to be fenced "are in motion or in use, except "where any such parts are necessarily exposed for examination "and for any lubrication or adjustment shown by such examina-"tion to be immediately necessary, and all such conditions as "may be specified in regulations made by the Secretary of State "are complied with." The question is whether these belts and pulleys were "in motion" when the respondent sustained his injuries. If they were not, then there was no contravention of the statute. It was not argued that the machine or its parts were "in use" when the accident happened and I do not find it necessary to determine precisely what is the meaning of those words because I do not think that that would assist the determination of the meaning of the phrase "in motion."

Using the phrase in its ordinary sense I do not think that one would naturally say of a man moving parts of a machine round to a required position that he had set the machine or its parts in motion. The phrase "in motion" appears to me to be more apt to describe a continuing state of motion lasting or intended to last for an appreciable time. But, on the other hand, it would not be a misuse of language to say that the respondent set the parts of the machine in motion. It is therefore necessary, in my judgment, to look at the context in which the phrase occurs to determine whether it must be held to denote any movement of the parts however small, however slow and however caused; or to have a more limited meaning. The exception which I have quoted and which follows immediately after the words " in motion or in use " appears to me to be very illuminating. It permits exposure while the parts are in motion where necessary for examination and for any lubrication or adjustment shown by such examination to be immediately necessary, but for no other purpose. There appears to be nothing in the Act to authorize setting exposed parts in motion for the purpose of executing repairs or of making any adjustments not immediately necessary. But there must be many occasions in the course of repairing and readjusting machinery when it is necessary to expose parts which in ordinary use must be fenced and to move them to an appreciable extent. There is some dispute whether it would have been practicable to devise some means of carrying out the necessary movements in this case while the guard was in position, but even if that could have been done in this case there must be other cases in which it would be impracticable. I can see no answer to the argument that, if the respondent's construction of section 16 is correct, it is practically impossible in such cases to make the necessary repairs and readjustments without committing an offence by contravening the provisions of section 16. It was argued for the respondent that the statutory powers to make regulations, particularly under section 60, were wide enough to enable the Secretary of State to deal with such cases, and therefore any unreasonable consequences of adopting the respondent's interpretation could be avoided. But I cannot agree that these powers to make regulations were intended or could be used for that purpose.

The fact that the interpretation for which the respondent contends would lead to so unreasonable a result is, in my opinion, sufficient to require the more limited meaning of " in motion " to be adopted unless there is some very strong objection to it, and none was suggested. It is true that the Factories Act is a remedial statute and one should therefore lean towards giving a wide interpretation to it, but that does not justify interpreting an ambiguous provision in a way which leads to quite unreasonable results.

There was much argument about inferences to be drawn from a comparison of provisions in the 1937 Act with corresponding provisions in the 1901 and earlier Acts. I do not get much assistance from these comparisons, but on the whole they appear to me to favour the appellants. The most relevant is a comparison of the exception in section 16 of the 1937 Act with section 10 (1) (*d*) of the 1901 Act, which requires that fencing must be maintained while the parts to be fenced are in motion or use " except where they are under repair or under examination " in connexion with repair, or are necessarily exposed for the " purpose of cleaning or lubricating or for altering the gearing or " arrangements of the parts of the machine." The reference to repair in the exception has been omitted in the later Act. On the narrower interpretation of " in motion " that omission is readily intelligible. It may well have been thought wrong to allow repair work involving the removal of fencing while a machine is running. But if the wider interpretation of " in motion " were correct it could hardly have escaped notice that this omission would give rise to the difficulties to which I have already referred, and I find it very difficult to attribute to Parliament an intention to create such difficulties. But these comparisons only confirm me in the opinion which I would have held without them.

There being no breach of statutory duty by the appellants the respondent could only succeed by proving common law negligence on the part of the appellants. But I agree with your Lordships that the evidence falls far short of establishing negligence. I therefore agree that the appeal should be allowed.

LORD TUCKER. My Lords, I agree with the trial judge (Pearson J.) that the evidence in this case was insufficient to warrant a finding of negligence against the respondent (the plaintiff in the action). Neither of the courts below have held the appellants guilty of common law negligence, there being no finding either way on this issue, the trial judge considering it unnecessary in view of his decision that the appellants were liable for breach of statutory duty, and the Court of Appeal not having heard any argument on the question. In this state of affairs it would, in my view, require very cogent evidence from the shorthand transcript to justify your Lordships at this stage of the proceedings in finding that the appellants were negligent by reason of their failure to take reasonable steps to provide a reasonably safe system of work, and I certainly do not consider that the evidence in the present case comes up to the required standard.

Agreeing, as I do, that a study of the Factories Acts from 1878 to 1937 lends no support to the appellants' main contention, namely, that the Act of 1937 on its true construction applies only to power-driven machinery, it remains to consider whether the trial judge and the majority of the Court of Appeal were right in holding that the appellants were in breach of their statutory obligation under sections 13 and 16 of the Factories Act, 1937, securely to fence the transmission machinery and constantly to maintain and keep in position such fencing while the transmission machinery was in motion.

The machinery in question being clearly "transmission "machinery," the only question is whether it was "in motion" when, the power derived from the prime mover having been cut off, the respondent was pulling the belt by hand so as to get the face plate into position for a necessary repair to be effected.

"Transmission Machinery" is defined by section 152 (1) as "every shaft, wheel, drum, pulley, system of fast and loose "pulleys, coupling, clutch, driving-belt or other device by which "the motion of a prime mover is transmitted to or received by "any machine or appliance." "Prime Mover" is defined as "every engine, motor or other appliance which provides mechani-"cal energy derived from steam, water, wind, electricity, the "combustion of fuel or other source."

What, then, is the meaning of the words "in motion" as applied to transmission machinery with which alone this case is concerned? My Lords, on this issue I am in complete agreement with the view expressed by Morris L.J. in his dissenting judgment in the Court of Appeal, when, after quoting the definitions of "transmission machinery" and "prime mover," he said[1]: "It "seems to me that in this case there was no motion of the prime "mover; there was no mechanical energy; there was nothing to "transmit, and no transmission was taking place." Accordingly, he held that the transmission machinery could not be described as "in motion." My Lords, I would respectfully adopt this language and reasoning, which seem to me to provide the answer in the present case without requiring any decision as to the meaning of the words "in motion" as applied to other kinds of machinery or the parts of other machines.

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[1] [1953] 2 Q.B. 95, 111; [1953] 2 All E.R. 43.

On this ground I would allow the appeal and enter judgment for the appellants.

LORD KEITH OF AVONHOLM. My Lords, I have had the advantage of reading the opinion of my noble and learned friend, Lord Reid, in which I concur.

Appeal allowed.

Solicitors: *Kenneth Brown, Baker, Baker for Gee & Edwards, Swansea; W. H. Thompson.*

[HOUSE OF LORDS.]

H. L. (E.)*
1954
Nov. 16, 17, 18, 22.
1955
Jan. 20.

LONDON CORPORATION . . . . . APPELLANTS;
AND
CUSACK-SMITH AND OTHERS . . . . RESPONDENTS.

Town and Country Planning—Purchase notice by owner—Refusal of permission to develop—Land let at less than rack-rent—"Owner" of land—Whether freeholder "owner"—Rack-rent—Derelict and sterilized site—Town and Country Planning Act, 1947 (10 *&* 11 *Geo.* 6, *c.* 51), *ss.* 19 (1), 119 (1).

By section 19 (1) of the Town and Country Planning Act, 1947, where permission to develop any land has been refused, any "owner of the land," claiming that it has become incapable of reasonably beneficial use in its existing state, may serve a purchase notice on the local council requiring them to purchase his interest in it.

By section 119 (1): "In this Act, except so far as . . . the "context otherwise requires . . . 'owner,' in relation to land, "means . . . a person . . . who . . . is entitled to receive the "rack rent of the land or, where the land is not let at a rack rent, "would be so entitled if it were so let. . . ."

The Corporation of London were the assignees of a lease for 75 years from 1925 at a rent of £750 a year (then less than a rack-rent) of premises which, owing to bomb damage, had in 1941 become a derelict site. In March, 1952, the freeholders applied to the corporation, as local planning authority, for permission to develop the site, but the corporation, who proposed to incorporate it in a road-widening scheme, refused permission. In September,

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* *Present*: LORD OAKSEY, LORD PORTER, LORD REID, LORD TUCKER and LORD KEITH OF AVONHOLM.

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1952, the freeholders purported to serve a notice on the corporation under section 19 (1) of the Act, requiring the corporation to purchase their interest in the land:—

Held (*per* Lord Reid, Lord Tucker and Lord Keith of Avonholm, Lord Oaksey and Lord Porter dissenting) that the freeholders were not "owners" within the meaning of section 19 and therefore were not entitled to serve the purchase notice, since the definition of "owner" in section 119 (1) applied to section 19 and, the land not being let at a rack-rent, it was the corporation who would be entitled to let at a rack-rent to a new hypothetical tenant.

Truman, Hanbury, Buxton & Co. Ld. v. *Kerslake* [1894] 2 Q.B. 774; 10 T.L.R. 668 approved.

Per Lord Oaksey. The definition of "owner" in section 119 is not applicable to section 19.

Per Lord Porter. Assuming that the definition in section 119 applies to section 19, then, on the hypothesis that the present lease stipulated for a rack-rent, the freeholders would be entitled to receive it, and therefore they are within the definition.

Held further, and unanimously, that the question whether a rent is or is not a rack-rent is to be determined according to the value of the land at the time of the letting.

Decision of the Court of Appeal (sub nom. *Regina* v. *Minister of Housing and Local Government; Ex parte London Corporation*) [1954] 1 Q.B. 140; [1954] 1 All E.R. 88 reversed.

APPEAL from the Court of Appeal (Somervell, Denning and Romer L.JJ.).

This was an appeal from an order of the Court of Appeal allowing an appeal from an order of the Queen's Bench Division (Lord Goddard C.J., Lynskey and Parker JJ.), whereby it was ordered that a decision dated December 31, 1952, made by the last respondent, the Minister of Housing and Local Government, pursuant to the Town and Country Planning Act, 1947, be removed into the Queen's Bench Division and thereupon quashed, and ordering that the order of the Queen's Bench Division be set aside and the decision of the Minister be restored. The first respondents were Sir William Robert Dermot Joshua Cusack-Smith and Elizabeth Dora Allsworth, trustees of the real estate of Alexander Jones, deceased, freeholders of certain premises known as 69, Ludgate Hill, in the City of London. The appellants were the Corporation of London.

The facts, stated by Lord Oaksey, were as follows: The Jones trustees were the trustees of the real estate of Alexander Jones, deceased, and they were, and they or their predecessors in office as trustees of the said real estate at all material times had been, entitled in fee simple to the said premises as trustees as aforesaid.

By a lease (hereinafter called "the lease") dated September 29, 1873, the Commissioners of Sewers of the City of London, who were then freeholders of the said premises, demised them to Thomas Treloar for a term of 80 years from September 29 aforesaid at a yearly rent of £350. By a conveyance dated May 26, 1874, the said Commissioners of Sewers conveyed the freehold reversion in the said premises immediately expectant upon the lease to the said Alexander Jones. On February 13, 1881, the said Alexander Jones died, and on March 5, 1881, probate of his will was granted out of the Principal Probate Registry to predecessors in office of the Jones trustees.

By an underlease (hereinafter called "the underlease") dated May 23, 1922, the trustees of the said Thomas Treloar, deceased, subdemised the said premises to Samuel Taylor Williamson and Eric Bryan Williamson for a term of 80 years less seven days from September 29, 1872, at an annual rent of £1,136. By an assignment dated October 2, 1924, the said Samuel Taylor Williamson and Eric Bryan Williamson assigned the underlease to Eric Bryan Williamson and Cameron Matthew Walker.

By a lease dated June 23, 1925 (hereinafter called "the lease "of the reversion"), the predecessors in office of the Jones trustees demised the freehold reversion in the said premises vested in them (but subject to and with the benefit of the lease) to Eric Bryan Williamson and Cameron Matthew Walker for a term of 75 years from September 29, 1924, at an annual rent of £750.

By an assignment dated February 19, 1940, the said Eric Bryan Williamson and Cameron Matthew Walker in consideration of the payment to them of £4,000 assigned the underlease to Hampton and Sons Ld. (hereinafter called "Hamptons").

On May 10, 1941, the buildings comprised in the said premises were completely destroyed by enemy action. The annual rent of £750 due under the lease of the reversion was nevertheless duly paid until November 29, 1951.

By an assignment dated April 8, 1942, the personal representatives of the last surviving trustee of the said Thomas Treloar, deceased, in consideration of the payment to them of £4,000 assigned the lease to Hamptons.

On and after April 8, 1942, the position was that the lease, underlease and lease of reversion had all become vested in Hamptons, while the freehold was vested in the predecessors in office of the Jones trustees.

By a letter dated February 9, 1950, and addressed to the appellants, Messrs. Gerald Eve & Co. submitted an application on behalf of Hamptons as lessees for planning permission to rebuild the said premises. By a letter dated May 2, 1950, addressed to Hamptons and a refusal of permission to develop enclosed therewith, the appellants refused planning permission for the said development. The reason stated for refusal was that the proposed development would prejudice the new layout of the area of extensive war damage in which the said premises were situated, including the provision of a roundabout at the junction of Ludgate Hill, New Bridge Street, Fleet Street and Farringdon Street.

On August 17, 1950, Hamptons served notice on the appellants under section 19 of the Act requiring the appellants to purchase the lease of the reversion, the appellants being by virtue of section 114 (2) of the Act the proper recipients of such a notice. By a letter dated November 9, 1950, the Minister of Town and Country Planning confirmed the said purchase notice.

On November 27, 1951, Hamptons at the instance of the appellants served on the Jones trustees a notice of retention under the Landlord and Tenant (War Damage) Acts, 1939 and 1941, in respect of the lease of the reversion. By virtue of section 10 (1) (*a*), (*b*), of the said Act of 1939 (2 & 3 Geo. 6, c. 72) the effect of the said notice of retention was (inter alia) that rent was no longer payable under the lease of the reversion until the said premises were rendered fit and that there was implied in the lease of the reversion a covenant by the tenant with the landlord that the said premises should be rendered fit as soon as was reasonably practicable. By a transfer dated December 19, 1951, Hamptons in consideration of the payment to them of £71,250 transferred the lease of the reversion to the appellants. The appellants by the transfer dated December 19, 1951, became bound in their capacity as leaseholders to reinstate the premises, although by reason of their refusal of planning permission the appellants well knew that there were no prospects of it becoming practicable for them as leaseholders to comply with their covenant by rendering the said premises fit.

By letter dated March 24, 1952, addressed to the appellants Messrs. Craig Hall & Co., chartered surveyors, on behalf of the Jones trustees submitted an application for planning permission to rebuild the said premises. By letter dated April 4, 1952, addressed to Messrs. Craig Hall & Co. and enclosing a statutory acknowledgment dated March 27, 1952, by the appellants, the appellants stated that planning permission had already been refused and a purchase notice confirmed and that it was not proposed to take any action on the said application.

By a form of appeal dated June 3, 1952, the Jones trustees appealed to the Minister under section 16 (1) and (3) of the Act and article 11 (1) (*c*) of the Town and Country Planning (General Development) Order, 1950 (S.I. 1950, No. 728) against the failure of the appellants to give notice of their decision within the period of two months after receipt of the said application as provided by article 5 (8) (*c*) of the said Order. The appellants agreed that the said premises had become incapable of reasonably beneficial use in their existing state. By a letter dated August 22, 1952, addressed to the solicitors to the Jones trustees the Minister dismissed the appeal on the grounds that the proposed development would prejudice the provision of the proposed roundabout at Ludgate Circus.

By a notice dated September 1, 1952, the Jones trustees required the appellants under section 19 of the Act to purchase their interest in the said premises, namely, the fee simple therein. By a letter dated October 2, 1952, addressed to the solicitors to the Jones trustees the Minister stated his intention of confirming the said purchase notice without modification unless the interested parties desired an opportunity of being heard.

By letter dated October 22, 1952, addressed to the Minister the appellants expressed a desire to be given an opportunity of being heard by a person appointed by the Minister for that purpose on the ground that the Jones trustees were not persons who could serve a purchase notice within section 19 of the Act. On December 1, 1952, one H. F. Summers appointed by the Minister heard representations by counsel on behalf of the appellants and by counsel on behalf of the Jones trustees. By a letter dated December 31, 1952, the Minister confirmed the said purchase notice and in pursuance of section 19 (2) of the Act directed that the appellants should be deemed to have served a notice to treat on December 31, 1952, in respect of the interest of the Jones trustees in the said premises.

Under a notice of motion dated March 16, 1953, the appellants applied to a Divisional Court of the Queen's Bench Division for orders of certiorari and mandamus to remove into the High Court and quash the said decision of the Minister. The applications were heard on April 28 and 29, 1953, by Lord Goddard C.J., Lynskey and Parker JJ.

On April 29, 1953, the judgment out of which the present appeal arose was given, directing that an order of certiorari should go and that the said decision of the Minister should be brought up and quashed with costs against the Jones trustees.

By a notice of appeal dated May 13, 1953, the Jones trustees appealed to the Court of Appeal, and on November 25 and 26, 1953, the appeal was heard by Somervell, Denning and Romer L.JJ., who reserved judgment. On December 15, 1953, judgment was given allowing the appeal.

Harold Williams Q.C. and *Derek Walker-Smith* for the appellants. The question is whether the trustees are "owners" within Part III of the Town and Country Planning Act, 1947, and accordingly owners for the purposes of section 19 (1). The answer is that they are not "owners." The definition of "owner" in section 119 (1) applies to the word as used in section 19 (1) and governs it, and the trustees are not within that definition. Nothing in the context of section 19 (1) requires a different meaning to be given to the word, whether one looks at the whole of the Act or at the section alone. A study of the Act, particularly section 27, makes it clear that no different meaning was intended in section 19, and that, if it had been, the same language would have been used as was used in section 27 (3). See also sections 20 and 22, where reference is made to persons having an interest in land. See further the definition of "owner" in section 65 (1) of the Town and Country Planning Act, 1944, in Schedule XI to the Act of 1947. Therefore unless a person is either in receipt of a rack-rent or would be entitled to receive it if the land were let at a rack-rent he cannot be an "owner" within section 19 (1).

In determining whether land is let at a rack-rent the material date is the date of the lease: see *Borthwick-Norton* v. *Collier*.[1] At that date the trustees were not entitled to receive a rack-rent, but far less. Before that sum was agreed on, the land had already been let at a far higher figure. Once land is let at a rack-rent a change of circumstances does not make any difference to the position established when the lease was granted, e.g., a fire destroying the premises, or the erection of a cinema increasing their value.

As to the second limb of the definition, where, as in this case, the land is not let at a rack-rent, the owner is the person who would be entitled to the rack-rent if, with the interests as they were at the date of the purchase notice, the land was let at a rack-rent. The words in their natural meaning presuppose that the lease retains its present form and that a letting is now made at a rack-rent. Therefore the appellants, being now in possession as leaseholders, alone can let and receive the rent, until their lease is determined. Thus if the premises were hereafter let at a rack-rent, the appellants are the persons who would receive it from the hypothetical tenant. The words of the definition have a long history in the Public Health Acts and similar Acts since 1848 and have been construed as now contended: see *Truman, Hanbury, Buxton & Co. Ld.* v. *Kerslake*,[2] which was rightly decided and is relied on. It was wrongly doubted in *Rawlance* v. *Croydon Corporation.*[3] *Bowditch* v. *Wakefield Local Board of Health*[4] and *Wright* v. *Ingle*[5] are not in point. The meaning put on the words in the earlier cases is not decisive, but the reasoning approving that for which the Corporation now contends is preferable to that of the Court of Appeal in the present case.

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[1] [1950] 2 K.B. 594; 66 T.L.R. (Pt. 2) 131; [1950] 2 All E.R. 204.

It is hard to conceive of the same land being let at two rack-rents to two different people, but even though there may be more than one rack-rent if land is let and sublet at different times when values have altered, there can only be one person who would be entitled to receive a rack-rent within the second part of the definition, and in this case it is the Corporation.

Derek Walker-Smith following. As to the use of the word "owner" in the Act of 1947, the definition in section 119 (1) excludes Part VI. That follows from section 58 (1) providing for a scheme for payments in respect of interests in land. The owner there was the owner of the interest and not the owner of the land. The subject-matter of Part IV of the Act is allied to that of section 19. Apart from Part VI there is no section to which the definition will not apply. The expression which is the subject of the definition occurs in the Act within a comparatively narrow range of context dealing with the same or similar subject-matter. The phrase in section 119 (1), "except in so far as . . . the context otherwise requires" is introduced to govern several definitions besides that of "owner." In the case of the use of "owner" there never is such a context.

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[2] [1894] 2 Q.B. 774; 10 T.L.R. 668.

[3] [1952] 2 Q.B. 803; [1952] 2 T.L.R. 460; [1952] 2 All E.R. 535.

[4] (1871) L.R. 6 Q.B. 567.

[5] (1885) 16 Q.B.D. 379; 2 T.L.R. 143.

On the question whether the definition in section 119 (1) governs section 19, it is wrong to assume that the latter is concerned only with the nature of interests as such (e.g., freeholds, ground leases, etc.). The section is concerned with interests as they stand in relation to the possession of the land or the parting therewith. A person who parts with possession, as the trustees have done, renders himself relatively uninterested in the land's development, and the object of section 19 is to afford a remedy to persons detrimentally affected by the refusal of town planning permission. The Court of Appeal wrongly ignored the time factor and assumed a static, instead of a progressive, situation whereby a freehold reversioner may, when his reversion falls in, serve a purchase notice in due course. The trustees cannot now demand reinstatement of the premises because there is no planning permission, and by 1999, when the lease ends, either the roundabout will have been built or it will be possible to redevelop the land.

There may be more than one type of owner who can satisfy the definition in section 119 (1), but in the ordinary signification of language, apart from the Act, there is only one owner of a piece of land and the words used are inapt to cover persons in the position of the trustees.

C. R. Winn and *R. J. Parker* for the respondent Minister. The Minister supports the Corporation and is here to say that he was wrong in confirming the purchase notice.

The narrower interpretation of the word "owner" is the proper one. The Act directs one to take the meaning from the definition in section 119 (1), unless "the context otherwise "requires." There is nothing in the context of section 19 which requires any other meaning to be given to the word. The only difficulty in the way of putting the definition straight into section 19 (1) is the use of the word "any" there. But "any owner" means any person who is an owner as defined by section 119 (1), and that includes an agent. Under the definition, if a person is in occupation himself and is getting the full beneficial user of the premises, it is to be notionally assumed that he would let the premises at a rack-rent. One must look first to see whether there is a rack-rent being received by any person. If so, that person is the owner. If there is no rack-rent being received by any person, then, in the simple, ordinary case, the person in occupation would be entitled to receive the rack-rent if there were a letting. No more complicated process of imagination is needed than to picture him making out a lease reserving to himself a full rack-rent. It produces a strained construction to travel outside the terms of the alternative sub-headings of the definition. The trustees are neither entitled to receive a rack-rent, nor are they persons who would be so entitled under the second part of the definition, which postulates only one such person. It is admitted that if the premises are in fact let and sublet at different periods there may be more than one rack-rent (see *Borthwick-Norton* v. *Collier* [6]), though, apart from authority it would be more reasonable to suppose that there can only be one rack-rent. [Reference was also made to *Eyre* v. *Johnson* [7] and *Rawlance* v. *Croydon Corporation*.[8]]

Harold Heathcote-Williams Q.C., *J. Ramsay Willis* and *Oliver Lodge* for the respondent trustees. (1) The first proposition for the trustees is that an "owner" under section 19 of the Act is any person in whom an interest in the land is vested, so that it is wrong to say that there can only be one "owner." Looking at section 19 alone, it is clear that more than one "owner" at the same time is contemplated and that the interests of each are to be dealt with. There is no difficulty in giving a different meaning to the word "owner" in different parts of the same Act: see *Tendring Union Guardians* v. *Dowton* [9] and *Birmingham Corporation* v. *Baker*.[10] It is too narrow to say that the sole object of section 19 is to afford a remedy to persons detrimentally affected by the refusal of planning permission. The whole body of the allied provisions in the Act shows that Parliament was trying to provide remedies for all the persons whose interests were affected by the legislation. The true view was properly expressed in the Court of Appeal in the present case.[11] Section 87 (4) of the Act supports this contention.

(2) The freeholders are owners within the meaning of section 19. In the popular sense the freeholder is always the owner, and he must be so here unless there is a definition which forbids it. See what was said in the Court of Appeal in the present case in argument and by the Lords Justices.[12]

(3) The freeholders are owners within the definition in section 119 (1). All freeholders fall within that definition. Alternatively, if the definition does not cover freeholders as such, then it is the freeholder who is in the position that it is he who, "where

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[6] [1950] 2 K.B. 594.

[7] [1946] K.B. 481; 62 T.L.R. 400; [1946] 1 All E.R. 719.

[8] [1952] 2 K.B. 803.

[9] [1891] 3 Ch. 265.

[10] (1881) 17 Ch.D. 782.

[11] [1954] 1 Q.B. 140, 150, 152, 154; [1954] 1 All E.R. 88.

[12] [1954] 1 Q.B. 140, 146, 150, 153–4, 156.

"the land is not let at a rack-rent, would be so entitled if it were "so let." This limb of the definition is to be read as indicating the supposition that the subsisting lease stipulates for a rack-rent or that the freeholder lets the land to a new hypothetical tenant at a rack-rent. There is no reason for limiting the supposition so as to exclude the freeholder.

(4) If the freeholders are not "owners" within the definition in section 119 (1), then the context of section 19 "otherwise "requires." That definition does not apply throughout the Act, e.g., in section 26 (2). It is inapt for the purposes of section 19.

(5) The material date for determining whether a rack-rent was payable was the date of the purchase notice, and at that time £750 was a rack-rent: see *Rawlance* v. *Croydon Corporation* [13] and Foa on Landlord and Tenant, 7th ed., p. 783. *Borthwick-Norton* v. *Collier* [14] is not fatal to the respondents' argument. By a change of circumstances a rent which was not a rack-rent when agreed upon may become a rack-rent.

Looking at the broad purpose of section 19 it has nothing in common with the case contemplated by section 119. It is the case of an owner of an interest who wants his land purchased because it has been sterilized. When one speaks of purchasing an interest one is dealing only with a person who has an interest. One cannot apply the definition in section 119 to section 19 because one is concerned, not with a particular owner but with buying out the interest of every owner who has a right to be bought out. If the definition is excluded, the word "owner" includes all owners of interests: see Lands Clauses (Consolidation) Act, 1845, s. 18, and Town and Country Planning Act, 1944, s. 65 (1). [Reference was also made to *Lennen* v. *Gibson & Howes Ld.*[15]]

Harold Williams Q.C. in reply. There is no reason for reading "owner" in section 19 in a sense such that the definition in section 119 could not apply. Prima facie it does apply. Only in the most exceptional circumstances could two persons satisfy the definition of "owner."

Their Lordships took time for consideration.

1955. Jan. 20. Lord Oaksey. My Lords, in this case the appellants are appealing from a judgment of the Court of Appeal in England dated December 15, 1953, whereby the court allowed an appeal by the first-named respondents (hereinafter called "the "Jones trustees") from a judgment of a Divisional Court of the Queen's Bench Division dated April 29, 1953, for an order of certiorari quashing a decision by the second-named respondent (hereinafter called "the Minister") dated December 31, 1952, and made pursuant to the Town and Country Planning Act, 1947 (10 & 11 Geo. 6, c. 51) (hereinafter called "the Act").

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[13] [1952] 2 K.B. 803.

[14] [1950] 2 K.B. 594.

[15] [1919] A.C. 709.

The issue in this appeal is whether the Jones trustees, who are the freeholders of certain premises known as No. 69, Ludgate Hill, in the City of London (hereinafter called "the said "premises"), are "owners" within the meaning of section 19 (1) of the Act.

The immediately relevant provisions of the Act are as follows:—

Section 19 (1): "Where permission to develop any land is "refused, whether by the local planning authority or by the "Minister, on an application in that behalf made under this "Part of this Act, or is granted by that authority or by the "Minister subject to conditions, then if any owner of the land "claims—(*a*) that the land has become incapable of reasonably "beneficial use in its existing state; and (*b*) in a case where "permission to develop the land was granted as aforesaid subject "to conditions, that the land cannot be rendered capable of "reasonably beneficial use by the carrying out of the permitted "development in accordance with those conditions; (*c*) in any "case, that the land cannot be rendered capable of reasonably "beneficial use by the carrying out of any other development "for which permission has been or is deemed to be granted under "this Part of this Act, or for which the local planning authority "or the Minister have undertaken to grant such permission, he "may, within the time and in the manner prescribed by regulations made under this Act, serve on the council of the county "borough or county district in which the land is situated a notice "(hereinafter referred to as a 'purchase notice') requiring that "council to purchase his interest in the land in accordance with "the provisions of this section."

Section 119 (1): "In this Act, except so far as the contrary "is provided or the context otherwise requires, the following "expressions have the meanings hereby respectively assigned to "them, that is to say:—. . . 'land' means any corporeal hereditament, including a building as defined by this section, and "in relation to the acquisition of land under Part IV of this Act "includes any interest or right in or over land; . . . 'owner,' "in relation to any land, means, except in Part VI of this Act, a "person, other than a mortgagee not in possession, who, whether "in his own right or as trustee or agent for any other person, is "entitled to receive the rack-rent of the land or, where the land "is not let at a rack-rent, would be so entitled if it were so let, "and, in Part VI of this Act, has the meaning assigned to it by "section 64 of this Act; . . ."

The only question in the case is whether the definition of "owner" in section 119 is such as to prevent a freeholder who has let the premises at less than a rack-rent from serving a purchase notice in respect of his interest in the land under section 19.

[His Lordship stated the facts and continued:] It was suggested in argument in your Lordships' House that a rent might become a rack-rent, though not a rack-rent when agreed upon, by a change of circumstances in the premises, and that, the said premises having been destroyed in 1941, the rent of £750 per annum agreed in 1925, which was admittedly not a rack-rent in 1925, became a rack-rent in 1941. I cannot agree with this argument.

Upon the main question, however, I am of opinion that the judgment of the Court of Appeal was right. It is, I think, clear that the definition of "owner" in section 119 contemplates only one owner at one time, and that it contemplates that either a person holding a freehold or leasehold interest may be an owner, since a freeholder may have let at a rack-rent or be entitled to do so, and so may a leaseholder, but they cannot both have let at a rack-rent at the same time. If the freeholder either lets at a rack-rent or does not let at all he must, in my opinion, be the owner within the meaning of the definition. If, on the other hand, he lets at a rent less than a rack-rent, then his lessee must, in my opinion, be the owner within the meaning of the definition since, being entitled to the premises for the period of his lease, which ex hypothesi was not let to him at a rack-rent, he alone can let the premises at a rack-rent. It follows, in my opinion, that there can be only one person who is an owner within the meaning of the definition at one time, but that person may be either a freeholder or a leaseholder. Section 19. on the other hand, cannot, in my opinion, be confined to one owner at one time, since the words "any owner . . . may . . . serve . . . a notice . . . "requiring that council to purchase his interest in the land" appear to me to refer to every owner who has an interest in the land, and since the definition itself may apply either to freeholders or to leaseholders there is nothing to prevent the word "owner" being understood in its widest sense. As Romer L.J. said,[1] the phrase "any owner" and not "the owner" appears to me "almost decisive of the question." If I am right in thinking that the word "owner" according to the definition can refer to one person only at any one time, the words "any owner of the "land . . . may . . . serve . . . notice" in respect of his interest form a context which, in my opinion, requires a wider meaning to the word "owner" than the meaning stated in the definition. In my opinion, it is an unnatural use of words to say that any owner may serve a purchase notice when there is and can be only one owner at the time of service. There appears to me to be no possible reason for limiting the right of serving a purchase notice to the one person who has let or can let at a rack-rent and no reason has been suggested.

In the present case the Corporation of the City of London, who hold the property under a lease from the respondents, claim to be entitled to refuse to develop or to reinstate the property and in the meantime to pay no rent. In my opinion, the words of the statute do not compel your Lordships to perpetuate such injustice.

I would therefore dismiss the appeal.

LORD PORTER. My Lords, the facts of this case present many complexities, but the ultimate question is a narrow one.

The matter in question is, I think, sufficiently adumbrated if one neglects the position at an earlier time and considers only that now existing when the respondents are owners of the fee simple of 69, Ludgate Hill, the appellants are lessees for a term of years ending in 1999, at a rent of £750 a year, and the property is conceded to be let for that period at less than a rack-rent unless the rent which could be obtained for it in its present condition is the relevant figure. The premises suffered extensive war damage and are now a bare site, and on November 27, 1951, Hamptons, who were the predecessors of the present appellants as lessees, served upon the appellants a notice of retention under section 10 of the Landlord and Tenant (War Damage) Act, 1939, whereby Hamptons were relieved from the payment of rent until it should be practicable for them to reinstate the premises. After the damage had been suffered two

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[1] [1954] 1 Q.B. 140, 154; [1954] 1 All E.R. 88.

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applications under the Town and Country Planning Act, 1947, were made for planning permission to rebuild the premises, one by Messrs. Hampton & Sons Ld., and the other by the respondents. Each was refused; the former on the ground that the proposed development would prejudice the new layout of the area of extensive war damage in which the site is situated, including the provision of a roundabout at the junction of Ludgate Hill, New Bridge Street, Fleet Street, and Farringdon Street; the latter on the ground that redevelopment had already been refused, that a purchase notice in respect of the owner within the meaning of section 119 of the Town and Country Planning Act, 1947, was confirmed by the Minister of Town and Country Planning, and that accordingly it was not proposed to take any action on the second application for permission to redevelop the site.

The first refusal was followed by a purchase notice under section 19 of the Act, and inasmuch as Hamptons were, in the appellants' view, the owners and the only owners of the site within the meaning of the Town and Country Planning Act, the appellants acting upon this view then paid compensation amounting to £71,250 to them and took an assignment of their lease.

The respondents did not accept the view that Hamptons or their successors, the present appellants, were the sole owners of the site and appealed to the Minister against the refusal of permission to develop the land. That appeal was dismissed.

Thereupon the respondents in their turn served on the appellants a purchase notice in respect of which the appellants failed to give notice of the decision to which they had come, but passed on the notice to the Minister, who signified to both parties that unless notified by November 3, 1952, that the Common Council of the City of London or the servers of the notice desired an opportunity of being heard, he would confirm the notice without modification.

Upon this intimation the appellants signified their wish to be heard by a person appointed by the Minister, and the matter was accordingly submitted to the consideration of Mr. H. F. Summers.

After receiving his report the Minister confirmed the notice, holding that he was not concerned to determine whether the respondents were owners or not, but that his only duty was to consider whether the conditions mentioned in section 19 of the Town and Country Planning Act, 1947, had been fulfilled in relation to the land.

Being dissatisfied with this decision the appellants, on March 16, 1953, applied for and obtained the leave of a Divisional

Court to apply for an order of certiorari to bring up and quash the decision of the Minister confirming the purchase notice. The Divisional Court granted the order, but on appeal the Court of Appeal reversed this decision. From their judgment no appeal has been taken to your Lordships' House by the Minister, but the present appellants have appealed and added the Minister as a second respondent.

In your Lordships' House, however, the appellants were supported in argument by the Minister's advisers, who joined with them in contending that the first-named respondents were not "owners" within the meaning of Part III of the Act, and therefore were not entitled to serve a purchase notice.

The sole, but none the less difficult, consideration for your Lordships' House is whether the respondents are such owners or not.

Before coming to grips with the matters in dispute, it is necessary to set out the wording of section 19 of the Act and the definition of "owner" in section 119.

Section 19: "(1) Where permission to develop any land is "refused, whether by the local planning authority or by the "Minister, on an application in that behalf made under this Part "of this Act, or is granted by that authority or by the Minister "subject to conditions, then if any owner of the land claims— "(*a*) that the land has become incapable of reasonably beneficial "use in its existing state; and . . . (*c*) in any case, that the land "cannot be rendered capable of reasonably beneficial use by the "carrying out of any other development for which permission has "been or is deemed to be granted under this Part of this Act, "or for which the local planning authority or the Minister have "undertaken to grant such permission, he may, within the time "and in the manner prescribed by regulations made under this "Act, serve on the council of the county borough or county "district in which the land is situated a notice (hereinafter "referred to as a 'purchase notice') requiring that council to pur"chase his interest in the land in accordance with the provisions "of this section. (2) Where a purchase notice is served on any "council under this section, that council shall forthwith transmit "a copy of the notice to the Minister, and subject to the following "provisions of this section the Minister shall, if he is satisfied "that the conditions specified in paragraphs (*a*) to (*c*) of the "foregoing subsection are fulfilled, confirm the notice, and "thereupon the council shall be deemed to be authorized to "acquire the interest of the owner compulsorily in accordance "with the provisions of Part IV of this Act, and to have served "a notice to treat in respect thereof on such date as the Minister "may direct. . . . (3) If within the period of six months from "the date on which a purchase notice is served under this section "the Minister has neither confirmed the notice nor taken any "such other action as is mentioned in paragraph (*a*) or paragraph "(*b*) of the last foregoing subsection, nor notified the owner by "whom the notice was served that he does not propose to confirm "the notice, the notice shall be deemed to be confirmed at the "expiration of that period, and the council on whom the notice "was served shall be deemed to be authorized to acquire the "interest of the owner compulsorily in accordance with the "provisions of Part IV of this Act, and to have served notice to "treat in respect thereof at the expiration of the said period. . . . "(5) Before confirming a purchase notice, or taking any other "action in lieu thereof . . . the Minister shall give notice of his "proposed action—(*a*) to the person by whom the notice was "served; (*b*) to the council on whom the notice was served; "(*c*) to the local planning authority for the area in which the "land is situated; and (*d*) to any other local authority whom the "Minister proposes, under the foregoing provisions of this section, "to substitute for the said council; and if within the period "prescribed by the notice under this subsection (not being less "than twenty-eight days from the service thereof) any person or "authority on whom that notice is served so requires, the "Minister shall, before confirming the purchase notice or taking "any such other action as aforesaid, afford to those persons and "authorities an opportunity of appearing before and being heard "by a person appointed by the Minister for the purpose."

By section 119 (1) of the said Act it is provided, inter alia, that—"In this Act, except so far as the contrary is provided or "the context otherwise requires, the following expressions have "the meanings hereby respectively assigned to them, that is to "say:— . . . 'owner,' in relation to any land, means, except in "Part VI of this Act, a person other than a mortgagee not in "possession, who, whether in his own right or as trustee or agent "for any other person, is entitled to receive the rack rent of the "land or, where the land is not let at a rack rent, would be so "entitled if it were so let. . . ."

On behalf of the appellants it was contended that the definition in section 119 applied to the word "owner" when used in section 19, and that the respondents were not owners within that section. No one was an owner, it was said, unless he was either in receipt of a rack-rent or entitled to receive it. The rent receivable by the respondents, viz., £750, was not a rack-rent; indeed, the land had been already let at a much enhanced figure before this sum was agreed upon.

So far as I am able to ascertain, the suggestion that £750 was a rack-rent when the purchase notice was served was not taken, or at any rate was not pressed, before the Minister, and I doubt if it was seriously argued in the courts below. It seems rather to have been accepted that it was not. Prima facie, having regard to the previous letting, this assumption was correct, and though in the ramifications of letting and subletting which are to be found in the circumstances of the case it is not possible to speak with absolute certainty, I do not think that, having regard to the treatment accorded to the point in the courts below, your Lordships ought to differ from their findings or assume that it might have been a rack-rent or send back the case that the point might be determined. It is true that the bare site may have been worth no more, and there is uncontradicted evidence to this effect, but, again, it was, I think, assumed below that whether a sum is a rack-rent or not, it is to be determined not according to the value of the land at the date of the notice to treat or to purchase but at the time at which the letting took place. In any case this assumption has the support of the Court of Appeal in *Borthwick-Norton* v. *Collier*,[2] a decision which, in my view, rightly expounds the law in that matter and also is in accordance with the use of the words " any owner " and not " the owner " in section 19 (1).

Such an opinion necessarily leads to the conclusion that there may be more than one owner at a time and more than one rack-rent, e.g., A lets to B in 1900 at what is then a rack-rent, and B in turn lets to C in 1910 at a much enhanced figure which by that time is the rack-rent of the premises. Both A and B would then be owners under the definition. The appellants and the Crown, as I understood them, conceded this point, though Mr. Winn, on behalf of the latter, would, were it not for earlier authority, have contended that there could only be one rack-renter and that the last.

This contention would no doubt simplify the matter, but I cannot myself think that a person who has once been a rack-renter can cease to be such because his lessee at a later date leases the property at a higher or, it may be, a lesser sum. In the present case, however, there is no person who, within the meaning of the definition, is entitled to receive the rack-rent, because there is no rack-rent to receive. As a result of this conclusion two questions arise—(1) Can it be said that the respondents would be entitled to receive the rack-rent if the premises were let at a rack-rent? and (2) Does the definition of the word "owner" apply to section 19?

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[2] [1950] 2 K.B. 594; 66 T.L.R. (Pt. 2) 131; [1950] 2 All E.R. 204.

So far as the second point is concerned, I am not at the moment prepared to give an assured answer. Prima facie, the definition applies, but not in a case where the context otherwise requires, and there are certain indications in section 19 itself that the definition does not fully apply. So far as the service of a notice is concerned no doubt it would be convenient that a person who was an agent or trustee should be entitled to serve a purchase notice, but when the later provisions of the section are considered "owner" seems to be confined to a person having an actual interest in himself, e.g., (*a*) section 19 (1) "requiring "that council to purchase his" (e.g., the owner's) "interest in "the land"; (*b*) section 19 (2) "acquire the interest of the "owner compulsorily"; (*c*) section 19 (3) "authorized to acquire "the interest of the owner compulsorily."

This phraseology does not accord well with the inclusion amongst "owners" of "trustees" or "agents." Nor can I think that the confinement of the definition to cases where the context does not otherwise require entitles one to strike out part of the definition in one place in the same section, e.g., in the places quoted above, and to retain it in others, e.g., where a notice has to be given. The definition where applicable must, I think, be applicable in whole, and to my mind it is not legitimate to say that in some places the definition applies in part, e.g., in one place it means the person entitled to a rack-rent and in another that person, his trustees and agents.

But, whatever answer is given to the second question, the first raises many difficulties both in substance and phraseology and requires careful consideration. Let it be assumed that the definition applies: Who, then, are the persons who would be entitled to receive the rack-rent if the property were let at a rack-rent?

It has been suggested by Denning L.J.[3] and, I think, is inherent in the opinions of all the members of the Court of

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[3] [1954] 1 Q.B. 140, 153.

Appeal, that the words are capable of and do bear two possible meanings and raise two questions, viz.: (1) If the lease retains its present form and the land were now to be let at a rack-rent, who would receive the rent? and (2) If the present lease stipulated not for the sum for which in fact it stipulates but for a rack-rent, who would receive that rack-rent?

Obviously, in the first case the appellants would receive it, and in the second the respondents. The appellants, therefore, contend for the first meaning and say it is the natural one: they are in possession as leaseholders, they alone can let and receive the rent until the lease is determined. Their argument is that they are the persons who would receive the rack-rent if the premises were hereafter to be let at a rack-rent, on the ground that they are the only persons who for the next 47 years are entitled to let the premises and receive the rent.

On the other hand, the respondents maintain that the definition has in mind a lease in different terms as regards rent—i.e., at a rack-rent—and that if the premises had been let at such a rent the respondents as owners would receive it.

On the face of it, the language might bear either meaning or, indeed, both. I should hesitate to say it meant both were it not for the use of the expressions " any owner " in section 19 and " ' a ' person " in the definition in section 119. The first indicates the existence of more than one owner and though, no doubt, as I have indicated, there can be more than one person who has let at a rack-rent, yet the article " a " person, though appropriate in the first part of the definition which deals with one in actual receipt of a rack-rent, is not apposite when the second part comes under consideration, viz., " a " before " person " who would be entitled to receive the rack-rent. In the latter case one is faced with the difficulty that if there is only one such person, it should be *the* person not *a* person. Therefore, just as there may be more than one person receiving a rack-rent, so I see no reason why there should not be more than one person entitled to do so.

The appellants in answer urge the difficulty that the language appropriate to such a result is that used in sections 20, 22 and 27, viz., those having an interest in land, and point forcibly to the definition contained in the Act of 1944, which is for some purposes incorporated in the present Act and in terms includes both freeholder and leaseholder within the definition of " owner." Against this it may be pointed out that if the premises were let by the freeholder at less than a rack-rent and with a provision against subletting, there would be no owner within the meaning of the Act, no one who could give or receive notices and no one at the time entitled to compensation.

I agree that, whatever solution be adopted, one is faced with serious difficulties, but the interpretation which I suggest, viz., that in this case "owner" may include both freeholder and lessee, is, in my opinion, justified by the terms of the Act. On behalf of the appellants it is said that the wording of the definition has a long history in the Public Health Acts, and that it has been construed in a sense different from that which has been adopted by the Court of Appeal in the present case—see *Truman, Hanbury, Buxton & Co. Ld.* v. *Kerslake*.[4] The statement is true, but that case has itself been doubted in *Rawlance* v. *Croydon Corporation*,[5] and in the present case a construction which would make both the freeholder and the lessee owners within the meaning of the section appears to me in accord with the general object of the Act.

To accept the other view would be to deprive the respondents, possibly for many years, of their rent of £750, though I agree that too much emphasis must not be laid upon such a consideration, inasmuch as the hardship is occasioned rather by the War Damage Act, 1939, than by the Act now under consideration. But faced with difficulties on either hand and with provisions which appear to have been passed without, at any rate, full appreciation of their result or apprehension of the circumstances in which they would have to be enforced, I prefer to adopt what, to my mind, is a construction at least as accurate as that contended for by the appellants and more consistent with the apparent intention of compensating those whose interests have been impaired.

I would dismiss the appeal.

LORD REID. My Lords, at all relevant times the respondents have owned the freehold of the subjects at 69, Ludgate Hill, with which this case is concerned, and these subjects have been let at a rent of £750 per annum under a lease which expires in 1999. When the buildings were destroyed by enemy action the tenants were Messrs. Hampton & Sons. For a time they continued to pay the rent. Then they applied for planning permission to rebuild. This was refused because of a proposal to use the site as part of a traffic roundabout at Ludgate Circus. Hamptons then served a notice under the Landlord and Tenant (War Damage) Acts electing to retain the lease on the terms specified in the Acts and required the appellants to purchase their interest in the lease under section 19 of the Town and Country Planning Act, 1947. The appellants purchased Hamptons' interest for a a price of £71,250 and are now the tenants. By virtue of the notice served by Hamptons, the appellants are freed from payment of rent while the subjects are unfit for use, and they are bound to rebuild as soon as that is practicable. But, so long as planning permission is withheld, there can be no rebuilding, so the respondents are not receiving any rent at present and may not get any rent for an indefinite period.

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[4] [1894] 2 Q.B. 774; 10 T.L.R. 668.

[5] [1952] 2 Q.B. 803; [1952] 2 T.L.R. 460; [1952] 2 All E.R. 535.

The respondents now seek to use section 19 of the 1947 Act to compel the appellants to purchase their freehold, and the appellants' reply is that the respondents are not entitled to invoke section 19: this section is only available to "any owner of the "land," and the appellants contend that the respondents are not owners of the land within the meaning of the section. They rely on definitions contained in section 119 (1) of the Act, which are as follows: [His Lordship read the definition and continued:]

The respondents' case is that they are owners of the land within the meaning of the definition, or alternatively that, if they are not, then the context requires that the definition of "owner" should not be applied, and, this definition being excluded, they are owners within the meaning of section 19. It is therefore necessary first to consider what is the meaning of the definition.

Ownership, within the meaning of the definition, depends on whether or not a person is or would be entitled to receive the rack-rent of the land. It is agreed that rack-rent means "a rent "of the full value of the tenement, or near it" (Blackstone's Commentaries, 1st ed., Vol. II, p. 43). But the letting value of land may vary greatly from time to time, and there is a dispute whether the definition requires one to look at the letting value when the lease was entered into or the value when a question arises and the definition has to be applied to find who is an owner. Taking the ordinary meaning of the words, I think that if land is let for a rent which is a rack-rent at the date of the lease, the land does not cease to be let at a rack-rent when during the currency of the lease the value of the land increases so that if a new lease were then made a higher rent could be got. I see no reason for supposing that rack-rent has any different meaning in this definition. A, the freeholder, may let to B for a rent of

£100 which is a rack-rent at the date of B's lease, and later B may sublet to C for a rent of £200 which is a rack-rent at the date of C's lease. It appears to me that then both A and B are entitled to receive a rack-rent of the land.

If this is the proper interpretation of the definition, then no one was at any relevant time entitled to receive the rack-rent of 69, Ludgate Hill. The lease under which the respondents are entitled to a rent of £750 was made in 1925, and in 1922 there was a sublease at a rent of £1,136. There is nothing to show either that the rent of £1,136 was more than a rack-rent or that the letting value had diminished in the period between 1922 and 1925.

The definition has two limbs, the first dealing with the case where a person is entitled to receive the rack-rent and the second with the case where the land is not let at a rack-rent. I do not find much difficulty about the first limb. There may be only one lease or there may be a chain of lease and subleases: if any one of the lessors is entitled to receive a rack-rent then the first limb of the definition applies, and if only one is entitled to receive a rack-rent then he and he alone is the "owner." For example, if A, the freeholder, lets to B at less than a rack-rent, and B sublets to C at a rack-rent, then it appears to me to be plain that B is an "owner" within the meaning of the definition but A is not. There is some difficulty if there are two rack-rents at the same time. It was said that in such a case only the last rack-rent comes within the definition: if in the instance which I have just given A had let to B at a rack-rent it was said that still B alone would be an "owner" and A would not. It was said that "a person . . . who . . . is entitled to receive *the* "rack-rent" indicates that only one rack-rent can be taken into account and only the person entitled to receive that rack-rent can be an "owner." But the definition refers to "*a* person" and not "*the* person," and its second limb comes into operation "where "land is not let at *a* rack-rent." It would, in my judgment, be putting too much stress on the definite article in the phrase "entitled to receive the rack-rent" to hold that this requires that there can only be one owner where the first limb of the definition is applicable, and I can find nothing else in the definition pointing to this interpretation. Moreover, this interpretation would lead to a strange result. If A lets to B at a rack-rent and B either does not sublet or sublets at less than a rack-rent, then undoubtedly A is an "owner," but this interpretation would mean that if B sublet at a rack-rent A would thereby lose his status of "owner." I would only accept such a result if compelled to do so. I am therefore of opinion that there can be more than one "owner" under the first limb of the definition, and that if the freeholder lets at a rack-rent he is and remains an "owner" no matter what his tenant may do.

The second limb of the definition appears to me to be more obscure. It must deal with two cases: the one where the land is not let at all, the freeholder being the occupier, and the other where the land is let but the rents payable by the tenant and the subtenant, if there is one, are not rack-rents. In each case it requires one to find a person who would be entitled to receive the rack-rent if the land were let at a rack-rent. In the case where the land is not let at all, this can only mean that one must suppose that there is in existence a lease by the freeholder to a hypothetical tenant under which the rent is a rack-rent. But where, as in the present case, the land is let but for less than a rack-rent the second limb is ambiguous. What has to be supposed is that the land is let at a rack-rent and one could suppose either that the rent of £750 under the existing lease was increased to what would have been a rack-rent at the date of that lease, or that the land was let by the appellants to a new hypothetical tenant at what is now a rack-rent. Simply taking the words of the definition there is no very obvious reason for making the one supposition rather than the other. But the two would produce diametrically opposite results. If the first is the supposition which the definition requires, then the respondents would be owners, because in this supposition they would be entitled to receive the rack-rent and the appellants would not be owners because they would only be paying rent and not entitled to receive any rent. But on the other supposition the appellants would be owners because they would be entitled to receive a rack-rent from their hypothetical tenant and the respondents would not be owners, being still only entitled to receive a rent which is not a rack-rent.

I cannot agree with the argument that when anyone claims or is alleged to be an owner, each supposition must be made in turn and if, by either supposition, he would be an owner, then the definition is satisfied. It appears to me that the second limb of the definition must have the one meaning or the other: it cannot have both.

My Lords, for several reasons I am of opinion that the latter is the supposition which the definition requires to be made. In the first place, as I have said, the supposition of a new hypothetical tenant paying a rack-rent is the only possible one where there is no lease in existence, the freeholder being the occupier, and, if the second limb of the definition requires that supposition to be made, in that case it would seem likely that it requires the same supposition to be made in the other case to which it applies. Generally there is no difficulty in making this supposition: one looks for the person who at the relevant date would be entitled to make a new lease at a rack-rent and supposes that he does so, and the only person entitled to make a new lease is the person in possession, in this case the appellants. No doubt there could be a case where the tenant or subtenant in possession of the land is effectively prohibited from subletting, but such a case must be unusual and I do not think it necessary to deal with it: it might perhaps be solved on the lines of the decision in *Bowditch* v. *Wakefield Local Board of Health.*[6]

Secondly, the other supposition would lead to a somewhat strange result. On this basis the respondents would be owners but only because Hamptons did not sublet at a rack-rent. If they had so sublet before the relevant date then the first limb of the definition would have applied, and I do not think that it is open to doubt that Hamptons would then have been "owners" being in receipt of a rack-rent, but the respondents would not have been "owners" because they were not entitled to receive a rack-rent. Indeed, in this very case a sublease was in existence from 1922 to 1940, and if that sublease was at a rack-rent and had still existed at the relevant date I do not see how the respondents could have maintained their claim to be owners within the meaning of the definition.

No doubt it would be wrong to prefer one interpretation of the definition merely because it fits section 19 better. The word "owner" occurs in a number of other sections and if the other interpretation fitted those other sections better that would be a very important consideration. But we were furnished by counsel with a list of the other sections and schedules where the word "owner" occurs and I have found none where the other interpretation seems to be called for. I leave out of account those sections which refer to the owner of an interest in land or the owner of a tenancy because the definition only applies where the word "owner" is used "in relation to any land," and, with an exception which is not here material, land means a corporeal hereditament. I do not intend to decide that the definition must apply to every one of these sections because such a question might arise in a future case. It is enough for present purposes to say that, if the definition applies, the meaning which I prefer is at least as appropriate as the meaning which I reject.

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[6] (1871) L.R. 6 Q.B. 567.

Finally, it is, I think, important to observe that for a very long time the definition of "owner" in the Public Health Acts has been in substantially the same terms as the definition in this Act, and in a case under the Public Health (London) Act, 1891, *Truman, Hanbury, Buxton & Co. Ld.* v. *Kerslake*,[7] where there were a lease and a sublease both at rents less than rack-rents, it was held that the sublessee was the "owner." Where Parliament has continued to use words of which the meaning has been settled by decisions of the court it is to be presumed that Parliament intends the words to continue to have that meaning. I do not think that in this case that is conclusive. Even if the case which I have cited were held to have conclusively settled the meaning of the definition in the Public Health Acts there are slight differences in phraseology and, more important, it does not necessarily follow that if Parliament uses the same words in quite a different context they must retain the same meaning. But at least this is a consideration of some importance.

I cannot find any very solid argument to set against these considerations. It is true that one would not expect a definition of "owner" to exclude in many cases those who are undoubtedly owners by any ordinary meaning of the word. But, as I have said, I see no escape from the conclusion that the freeholder is excluded in cases where he has let at less than a rack-rent and his tenant has sublet at a rack-rent, and, if that be accepted, it is not very surprising that such a freeholder is also excluded in cases to which the second limb of the definition applies. In my judgment, a freeholder who lets at less than a rack-rent is excluded by the definition both in cases where his tenant does not sublet and in cases where he does sublet either at a rack-rent or at less than a rack-rent, and therefore if the definition is applicable to section 19 the appellants must succeed.

I now turn to the respondents' alternative contention that the definition of "owner" does not apply to section 19. By section 119 the definition applies "except so far as the contrary "is provided or the context otherwise requires," and it is maintained that the context of section 19 requires that the definition shall not apply to it. Section 19 applies to cases where land has become incapable of reasonably beneficial use in its existing state, and permission to develop the land has been refused ; and admittedly that is the case here. The section must have been passed in the knowledge and with the intention that it would apply to many cases where war damage is the cause of the land being useless in its existing state, and with the knowledge that by reason of the provisions of the Landlord and Tenant (War Damage) Acts many landlords would suffer loss of rent as the respondents are suffering in this case, and that refusal of planning permission would greatly increase such loss. In the ordinary case where planning permission is not required or is granted the landlord only suffers loss of rent until the war damage is made good, and the tenant who elects to retain his lease must make good that damage as soon as reasonably practicable. But where planning permission to reinstate is required and is refused, as in the present case, the landlord may continue to suffer loss of rent for a long period after the time when the damage could have been made good if permission to reinstate had been granted.

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[7] [1894] 2 Q.B. 774.

In such cases section 19 affords a remedy to " any owner of " the land " so affected: it entitles him to require the local authority to purchase his interest in the land. The owner then gets his capital out of the sterilized land and can use it for some remunerative purpose. But if the definition of " owner " in section 119 applies to this section and has the meaning which, in my judgment, must be attributed to it, the result is discrimination against these proprietors who, like the respondents, have let their land for less than a rack-rent. They are refused the remedy which section 19 professes to afford to " any owner," and they get no compensation or relief in respect of the loss which they suffer by reason of the refusal of planning permission. The question is whether that intention must be attributed to Parliament by reason of the terms of the Act.

Generally one would be slow to attribute such an intention to Parliament, but in this case there are two matters which I think it necessary to note before dealing with the immediate context. The Act of 1947 affords a remedy of one kind or another in a variety of cases, but in most cases that remedy is afforded expressly to every person who has an interest in the land. I need only refer to sections 20, 22 and 27. But in sections 9 and 19, and so far as I can see nowhere else, relief is given to any owner of the land. The word " owner " is not frequently used in the Act except in connexion with service of notices, but an interest in land is an expression very frequently used. For example, the sections dealing with compulsory acquisition and compensation do not refer to the land or an owner but to the acquisition of interests in land from persons having such interests. In my view, the expression "any owner of the land" must have been used deliberately in sections 9 and 19, and it must have been used because the usual expression "any person having an "interest in the land" was inappropriate in these sections. And it could only be inappropriate if the intention was to exclude persons having some kinds of interest and to restrict the benefits of these sections to some only of those having interests in the land.

I would also draw attention to the fact that in the Town and Country Planning Act, 1944, there is a different definition of "owner" and that definition is set out for a limited purpose in Schedule XI to the 1947 Act. That definition includes both persons entitled to dispose of the fee simple and persons holding under a lease which has more than three years to run. So the 1947 definition, on my interpretation of it, must have been inserted with the intention of excluding from the class of "owners" persons who would have been within that class under the earlier Act.

In these circumstances there appears to me to be a very strong presumption that the word "owner" was inserted in section 19 with the intention of excluding certain interests in the land from the benefit of the section and with the intention that "owner" should have the meaning attributed to that word by the new definition in section 119. Section 119 enacts, inter alia, that the expressions there defined shall have the meanings there assigned to them except so far as the contrary is provided, and it would have been easy to provide the contrary if that had been intended.

Before it could be held that "the context otherwise requires," it would, in my view, be necessary to show not only that the application of the definition leads to a result which Parliament cannot be supposed to have intended but also that, if the definition is excluded, the result will be a more reasonable result which Parliament can be supposed to have intended. Here if the definition is excluded the section will only apply to "any "owner," and in the absence of a definition I do not see how a lessee can be held to be an owner of the land, particularly when land is defined as meaning a corporeal hereditament and only as including an interest in land in relation to the acquisition of land under Part IV of the Act. And this is not in relation to such acquisition. But no one can suggest that it would be reasonable or possible to exclude from the benefit of section 19 a lessee under a 99-year building lease who does not pay a rack-rent to the ground landlord but who receives a rack-rent from his tenants. Yet I can see no way of including him if the definition of "owner" is excluded, for, as I have already said, I think it is impossible to hold that "any owner of the land" means any owner of any interest in the land.

I have not overlooked certain other arguments for the respondents. It was said that the words "any owner" in section 19 show that there can be two owners at the same time: that would be an argument of some weight if there could only be one owner within the meaning of the definition, but I have stated my view that there can be two owners under the first limb of the definition, and if that is right this argument loses its force. Then it was said that under the definition an agent can be an "owner" but that an agent could not be an owner within the meaning of section 19 because he has no interest in the land which he could require the local authority to purchase: but by section 119 the definition applies "except *so far as* . . . the context otherwise "requires," and even if the context requires that the reference to an agent shall not apply as regards section 19 that does not prevent the application of the rest of the definition. So, in my opinion, the actual wording of section 19 is in no way inconsistent with the application of the definition.

On the whole matter, on a consideration of the terms of the Act, from which alone I am entitled to infer the intention of Parliament, I cannot avoid the conclusion that relief under section 19 is not made available equally to all owners of interests in land who may suffer loss, and that the respondents, though freeholders, do not come within the ambit of the section. The result in this case may seem unjust. Parliament may not have realized the full effect of what has been enacted. But such consideration cannot override the terms of the Act and I am unable to construe those terms in such a way as to entitle the respondents to the relief which they seek. I am therefore of opinion that this appeal must be allowed.

Lord Tucker. My Lords, I think that the Divisional Court came to the right decision in this case.

The first question is whether or not the definition of "owner" in section 119 of the Town and Country Planning Act, 1947, is applicable to section 19. Section 119 contains some 54 definitions of words and phrases occurring in the Act. [His Lordship read the definition of "owner" and continued:]

Section 19 (1), so far as material for present purposes, reads: [His Lordship read the subsection and continued:] Before discarding the definition as contrary to the requirements of section 19 it is desirable to inquire what meaning the section clearly requires to be assigned to the word "owner." "Freeholder" is the meaning which first suggests itself, but this must be discarded since its adoption would result in manifest injustice equal to, if not greater than, that which is said to flow from the definition, since it would exclude all leaseholders whatever the duration of their leasehold interests. "The owner of any interest in the land" is the only substitute for the words "any owner" that would appear to satisfy the requirements of justice, but the legislature has deliberately chosen not to use those words which occur in other sections of the Act and to use instead the words "any owner." It seems to me quite impossible in these circumstances to give to the words "any owner" the meaning "the owner of any interest in the land." This is to rewrite the section. I can therefore find no justification for rejecting the definition contained in section 119.

What, then, is the proper construction of this definition?

It is, I think, helpful to notice that by section 113 of the Act it is provided in subsection (6), "In accordance with the foregoing provisions of this section, the Act of 1944 shall, as from the appointed day, have effect as set out in Schedule XI to this Act." Schedule XI contains a number of sections of the 1944 Act which are unrepealed and reprinted as amended by the 1947 Act. Included therein is section 65 which contains the following definition: "'Owner,' in relation to any building or land, means a person, other than a mortgagee not in possession, who is for the time being entitled to dispose of the fee simple of the building or land, whether in possession or in reversion, and includes also a person holding or entitled to the rents and profits of the building or land under a lease or agreement, the unexpired term whereof exceeds three years."

So that when Parliament adopted the definition of "owner" contained in section 119 of the Act of 1947 they had before them an alternative definition which they restricted to the re-enacted sections of the Act of 1944. It is a definition which, if applied to section 19, would give to the respondents the remedy which they seek to extract from the very different language of the definition in section 119 which follows very closely the familiar language of the Public Health Acts which the courts have had to construe from time to time. The definition is based on the test of rack-rent—actual or hypothetical. The first limb deals with the situation where there is in existence a rack-rent. The person entitled to receive it is the owner of the land. Whether there can be more than one owner where there are several different rack-rents issuing out of the same land under different leases is, I think, a question of difficulty. The words " the rack-rent " favour the view that there can be only one rack rent. On the other hand, in construing the definition with reference to section 19, I think that the words " any owner " are really decisive in favour of more than one owner where there are several rack-rents. As in the present case there is no rack-rent payable unless the material date for determining whether a rent is a rack-rent is the date of the purchase notice as distinct from the date of the lease, which, in the absence of authority, I cannot accept, it is necessary to consider the applicability of the second or hypothetical limb of the definition to the facts of this case. The land not being let at a rack-rent, who would be entitled so to let it? There can, I think, be only one answer, viz., the tenant in possession, i.e., the Corporation of London.

It is contended that where there are in existence more than one lease at rents less than rack-rents you should apply the hypothesis to the existing leases and in every case where there is a rent of whatever amount, including a ground rent, deem it to be a rack-rent. If this had been the intention of Parliament it would have been perfectly simple to discard all reference to rack-rents and make the right to let or receive rent the test of ownership. It is in connexion with this suggested construction that the presence in the Act of the 1944 definition referred to above appears to me so significant. With this definition before them it seems to me impossible to suppose that Parliament could have adopted the contrasted language of the definition in section 119 if they had intended to produce the result contended for by the respondents. For these reasons I would allow the appeal.

LORD KEITH OF AVONHOLM. My Lords, the question whether section 19 of the Town and Country Planning Act, 1947, authorizes the purchase notice that was served by the first-named respondents (whom I shall refer to as " the trustees ") depends on whether, in the circumstances as they existed at the date of the purchase notice, the trustees were " owners," within the meaning of section 19, of the land to which the purchase notice referred.

This raises another question, namely, whether the word " owner " in section 19 is to be construed by reference to the definition of " owner " in section 119 of the Act. The definition section requires the definition of " owner " to be applied " except so far " as the contrary is provided or the context otherwise requires." There is nothing in section 19 that expressly excludes the application of the definition, and it remains to ask whether the context of section 19 requires its exclusion. In considering this question I find it easier to consider first what the definition of " owner " itself means, for the definition presents certain difficulties of construction and until these difficulties are resolved it is not possible, in my opinion, to approach the question whether the definition is excluded by the context of section 19.

I need not repeat the words of the definition. It plainly has in view two cases, (1) land which is let at the rack-rent, and (2) land which is not let at a rack-rent, because it is let at less than the rack-rent, or is not let at all. Where the land is let at the rack-rent the person who is entitled to receive that rack-rent is the owner, and that finishes the matter of ownership. There is a question, however, of how the rack-rent is to be ascertained. Two views may be suggested. First, that there is to be a factual inquiry as to what would be the rack-rent at the material point of time if a lease of the land were given then, irrespective of the rent in the existing lease; or second, that the inquiry should be confined to the question whether the rent in the existing lease was a rack-rent of the land in question when the lease was granted. In my opinion, the latter view is to be preferred. Otherwise there would be no fixity in the matter. Every time that the application of the definition arose the matter would have to be considered afresh, with all the expense attendant on what might be a matter of skilled valuation. The task might be of frequent occurrence in view of the numerous legislative provisions in the Act to which the definition applies and occasions on which the provisions may have to be operated. On the other hand, if the date of the lease be the relevant date the matter is greatly simplified. If there is nothing to suggest that ordinary commercial considerations did not apply, that the rent was not a full rent fixed in the open market, and if what was let was the subjects in their present shape let by a person in actual possession, the stipulated rent could readily be assumed to be the rack-rent. That it should continue to be the rack-rent during the currency of the lease, at least if no underlease is later negotiated, is only reasonable as no occasion to test the market afresh has arisen. To say that a person who was an owner by virtue of having originally let at a rack-rent has ceased to be an owner merely because of a change in values would result in administrative inconvenience and at the lowest great uncertainty as to who was, or was not, the owner, and as to the individual's rights and duties. In my opinion, with one possible qualification, it can be said that once a rent is a rack-rent it is always a rack-rent during the currency of the lease. Conversely, what is not a rack-rent at the beginning of a lease and remains the rent throughout the lease cannot become a rack-rent during the currency of the lease. The question of a qualification arises where a lease at a rack-rent has been followed by an underlease also at a rack-rent. There is much to be said for the view that the underlease displaces the lease as the criterion of ownership within the meaning of the definition, and that the granter of the underlease becomes the sole owner. He must be at least an owner. The reference in the definition to "the rack-rent" and not to "a rack-rent" in the first alternative limb is certainly suggestive of the fact that the definition contemplated only one owner. Whether there can be more than one owner at a time in the sense of the definition is not, however, a question that arises in the circumstances of this case, although it arises as quite a different question in considering section 19, and I would reserve my opinion on this point.

The second alternative limb of the definition does not, in my opinion, give rise to the same difficulties of construction. If the land is not let at a rack-rent there is no room, in my opinion, for more than one owner at a time. I cannot agree with Denning L.J. that the words "if it were so let" can be given two meanings to suit the circumstances of the case. In my opinion, for reasons which I shall elaborate later, the person who would be entitled to receive the rack-rent of the land if it were let at a rack-rent would be the person in possession under a lease or underlease.

To apply the definition, then, to the facts of the present case, the appellants as assignees of Hamptons are in possession of the land in question, and but for the notice of retention served by Hamptons of November 27, 1951, under the Landlord and Tenant (War Damage) Acts, 1939 and 1941, would be paying a rent of £750 to the trustees. The matter may be looked at as it was before November 27, 1951. Hamptons were then lessees in possession. The rent of £750 which they paid to the trustees was, in my opinion, less than the rack-rent. It was not seriously suggested that it was the rack-rent at the date of the lease, and the fact that the land was let on an underlease, three years before, at a rent of £1,136 per annum, is practically conclusive of the matter. If, therefore, the definition is to be applied in the circumstances of this case we have land let at less than the rack-rent. As I have indicated, the owner, in my opinion, was Hamptons and is now the present appellants. They, in my view, are the only persons who would be entitled to receive the rack-rent if the land were let at a rack-rent. They are the only persons entitled at the moment to let the land at a rack-rent. I cannot accept the view which commended itself to Denning L.J. and Romer L.J. that the definition can be divorced so far from actuality as to cover the case of a person who could have let the land in the past at a rack-rent, if he had not chosen to let it at less than a rack-rent. The natural way to construe the definition in its application to an actual case is, in my opinion, to ask, who is entitled to let the land at a rack-rent as things are today? I am strengthened in my view by the fact that this was the construction put upon a substantially similar definition in the case of *Truman, Hanbury, Buxton & Co. Ld.* v. *Kerslake*,[7] and that, whereas an entirely different definition of owner was introduced into the Town and Country Planning Act, 1944, and the Acquisition of Land (Authorization Procedure) Act, 1946, the legislature in 1947 reverted to a definition which has appeared repeatedly in earlier legislation. It must be assumed that Parliament knew of the judicial interpretation that had been put on the old definition.

When I turn to section 19 of the Act I find no compelling reason to think that the context of the section requires the exclusion of the definition of owner in applying that section. It is said that the definition includes an agent, and that a purchase notice served by an agent does not fit into the concept of the section. I am not satisfied that that is so. The definition refers to an " agent for any other person " and if an agent makes a claim or serves a purchase notice under section 19, I assume he could only do so for his principal and that it is his principal's interest that would be affected by the claim and notice. On any other view the only result would be that the context of section 19 requires the exclusion of an agent from among the persons entitled to claim as owners.

The point most strongly pressed for the trustees was that the reference to " any owner " and to the purchase of " his interest " showed that more than one owner was covered by section 19 and that accordingly the definition did not apply. This only creates further difficulties. If the definition does not apply, what meaning is to be given to "owner"? There would be only one person clearly covered and that would be the freeholder. But in many cases he would be the person least affected by refusal of permission to develop the land. It is not possible, in my opinion, without the aid of a definition, to stretch the word "owner" to cover other interests in land, or all interests in land. I agree also that the inference from other sections of the Act in which the word owner is used in conjunction with other persons interested in the land, and particularly section 27, is adverse to the view that "owner" in section 19 can have any such extensive meaning.

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[7] [1894] 2 Q.B. 774.

In my opinion, the words "any owner" in section 19 can receive full effect if the definition is applied and the words are taken to refer to different owners at different times. As leases fall in other persons who qualify as owners under the definition will become entitled to have their interest in the land purchased if permission to develop is still refused and the other conditions of the section are satisfied. In the result I reach the conclusion that the judgment of the Divisional Court was right.

I would allow the appeal.

Appeal allowed.

Solicitors: *Comptroller of the City of London; Boxall & Boxall; Solicitor to the Ministry of Health.*

H. L. (E.)*

1954
Nov. 8, 9, 10, 11.

1955
Jan. 20.

[HOUSE OF LORDS.]

BENMAX . . . . APPELLANT;

AND

AUSTIN MOTOR CO. LD. . . . . . RESPONDENT.

Court of Appeal — Fact, question of — Appeal from High Court — Findings of fact at first instance—Independent view on appeal—Principles applicable—Appeal to House of Lords.
House of Lords.

There is a distinction between the finding of a specific fact and a finding of fact which is really an inference drawn from facts specifically found. In the case of the latter the appellate tribunal will more readily form an independent opinion than in the case of the former which involves the evaluation of the evidence of witnesses, particularly where the finding could be founded on their credibility or bearing.

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* *Present*: VISCOUNT SIMONDS, LORD MORTON OF HENRYTON, LORD REID, LORD TUCKER and LORD SOMERVELL OF HARROW.

Decision of the Court of Appeal (1953) 70 R.P.C. 284 affirmed.

Appeal from the Court of Appeal (Evershed M.R., Jenkins and Morris L.JJ.).[1]

This was an appeal from an order of the Court of Appeal dated November 17, 1953, reversing the judgment of Lloyd-Jacob J. dated May 8, 1953, in an action in which the appellant, Sydney Benmax, was plaintiff, and the respondents, Austin Motor Co. Ld., were defendants. The main question for determination in this appeal was whether the appellant's letters patent No. 586058 were invalid on the ground that the invention claimed therein was, having regard to what was known and used before the priority date of the claims, either not new (Patents Act, 1949, section 32 (1) (*e*)), or obvious and not involving any inventive step (section 32 (1) (*f*)).

The action was brought by the appellant in the Chancery Division of the High Court of Justice for an injunction to restrain the respondents from infringing letters patent No. 586058 granted to him for an invention entitled "improvements in or relating to "the upholstering of furniture" and dated September 4, 1944. By their defence the respondents denied that they had infringed the letters patent and alleged that they were invalid for the reasons set forth in the particulars of objections. They counterclaimed for the revocation of the letters patent and for an injunction restraining the appellant from threatening proceedings for infringement thereof, and for a declaration that such threats were unjustifiable. In order to claim the protection accorded to innocent infringers by section 59 (1) of the Patents Act, 1949, they also alleged that until the date of the appellant's alleged threat (June 5, 1951), they were not aware of the existence of the letters patent and did not have any reasonable grounds for supposing that they existed.

K. W. Shelley Q.C. and *J. N. Whitford* for the appellant. The question whether or not there is an inventive step must be decided by comparison between the monopoly claimed and the admissible material relating to the prior art. In that connexion one must consider the mind of the average worker in the art. On this question the trial judge found in favour of the appellant. When in such a case the relevant facts are known, the question is analogous to a jury question: *Allmanna Svenska Elektrishka A/B* v. *Burntisland Shipbuilding Co. Ld.** Accordingly, the Court of Appeal should not have reversed the judge's decision save on the same principles that a jury's decision may be interfered with since he heard the witnesses.

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[1] (1953) 70 R.P.C. 284.

Charles Russell Q.C., *K. R. Johnston Q.C.* and *G. W. Tompkin* for the respondent company. On the question of the inventive step the Court of Appeal was entitled to differ from the trial judge on his inferences from the facts proved in evidence. There being no question in that connexion as to the reliability of witnesses, the appellate tribunal is in as good a position as the trial judge to appraise the effect of the evidence.

Their Lordships took time for consideration.

1955. Jan. 20. The House dismissed the appeal.

This report is concerned only with their Lordships' observations as to the principles guiding an appellate tribunal in dealing with findings of fact by a court of first instance.

Viscount Simonds. My Lords, I have had the privilege of reading the opinion which my noble and learned friend, Lord Morton of Henryton, is about to deliver, and I agree so fully with it that I think it unnecessary to add anything except on one question of general importance which has once more been raised on this appeal.

Counsel for the appellant urged in the forefront of his argument that the existence of an inventive step was a question of fact which had been decided by the trial judge, Lloyd-Jacob J., in favour of the appellant, and therefore that the Court of Appeal should not have reversed his decision except for certain reasons which clearly were not present in this case. I think it convenient therefore to state my view on this question, though I am aware that it does not entirely agree with observations made in this House by noble Lords for whose opinion I have the highest regard. Fifty years ago, in *Montgomerie & Co. Ld.* v. *Wallace-James*,[1] Lord Halsbury L.C. said: "But where no question "arises as to truthfulness, and where the question is as to the "proper inferences to be drawn from truthful evidence, then

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* (1951) 69 R.P.C. 63, 70.

[1] [1904] A.C. 73, 75.

"the original tribunal is in no better position to decide than the "judges of an Appellate Court." And in *Mersey Docks and Harbour Board* v. *Procter*,[2] Lord Cave L.C. said: "The procedure on an appeal from a judge sitting without a jury is not "governed by the rules applicable to a motion for a new trial "after a verdict of a jury. In such a case it is the duty of the "Court of Appeal to make up its own mind, not disregarding "the judgment appealed from and giving special weight to that "judgment in cases where the credibility of witnesses comes "into question, but with full liberty to draw its own inference "from the facts proved or admitted, and to decide accordingly." It appears to me that these statements are consonant with the Rules of the Supreme Court, which prescribe that "all appeals "to the Court of Appeal shall be by way of rehearing" (R.S.C., Ord. 58, r. 1), and that "the Court of Appeal shall have power "to draw inferences of fact and to give any judgment and make "any order which ought to have been made" (r. 4). This does not mean that an appellate court should lightly differ from the finding of a trial judge on a question of fact, and I would say that it would be difficult for it to do so where the finding turned solely on the credibility of a witness. But I cannot help thinking that some confusion may have arisen from failure to distinguish between the finding of a specific fact and a finding of fact which is really an inference from facts specifically found, or, as it has sometimes been said, between the perception and evaluation of facts. An example of this distinction may be seen in any case in which a plaintiff alleges negligence on the part of the defendant. Here it must first be determined what the defendant in fact did and, secondly, whether what he did amounted in the circumstances (which must also so far as relevant be found as specific facts) to negligence. A jury finds that the defendant has been negligent, and that is an end of the matter unless its verdict can be upset according to well established rules. A judge sitting without a jury would fall short of his duty if he did not first find the facts and then draw from them the inference of fact whether or not the defendant had been negligent. This is a simple illustration of a process in which it may often be difficult to say what is simple fact and what is inference from fact, or, to repeat what I have said, what is perception, what evaluation. Nor is it of any importance to do so except to explain why, as I think, different views have been expressed as to the duty of an appellate tribunal in relation to a finding by a trial judge. For I have found, on the one hand, universal reluctance to reject a finding of specific fact, particularly where the finding could be founded on the credibility or bearing of a witness, and, on the other hand, no less a willingness to form an independent opinion about the proper inference of fact, subject only to the weight which should, as a matter of course, be given to the opinion of the learned judge. But the statement of the proper function of the appellate court will be influenced by the extent to which the mind of the speaker is directed to the one or the other of the two aspects of the problem.

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[2] [1923] A.C. 253, 258–9; 39 T.L.R. 275.

In a case like that under appeal where, so far as I can see, there can be no dispute about any relevant specific fact, much less any dispute arising out of the credibility of witnesses, but the sole question is whether the proper inference from those facts is that the patent in suit disclosed an inventive step, I do not hesitate to say that an appellate court should form an independent opinion, though it will naturally attach importance to the judgment of the trial judge. I ought not to conclude this opinion without saying how much I have owed in the preparation of it to certain writings by Professor Goodhart.

I would dismiss this appeal.

LORD MORTON OF HENRYTON, having stated his reasons in favour of dismissing the appeal, continued: Counsel for the appellant pointed out that the existence or non-existence of an inventive step is a question of fact decided in favour of the appellant by the trial judge, who had the advantage of seeing and hearing the witnesses. They suggested that your Lordships should hesitate long before overruling his decision. My Lords, this is an argument of great weight if the credibility of witnesses has come in question; but in the present case it would appear that the learned judge did not doubt the credibility of any witness, and formed his views by inference from the evidence as a whole. The Court of Appeal formed the opposite view by the same method and I agree with that court.

My last observations were prepared before I had the privilege of reading in print the speech which has just been delivered from the Woolsack. It will be apparent from these observations that my views on the subject of appellate courts in no way differ from those which have just been expressed by my noble and learned friend, Viscount Simonds.

I would dismiss the appeal.

Lord Reid. My Lords, I have had an opportunity of reading the speech which my noble and learned friend, Lord Morton of Henryton, has just delivered. I agree with it and I cannot usefully add anything to it. I have also had an opportunity of reading the speech of my noble and learned friend, Lord Simonds. I am also in agreement with it but, in view of the general importance of the question with which he has dealt, I think it right to express my views in my own words.

Apart from cases where appeal is expressly limited to questions of law, an appellant is entitled to appeal against any finding of the trial judge, whether it be a finding of law, a finding of fact or a finding involving both law and fact. But the trial judge has seen and heard the witnesses, whereas the appeal court is denied that advantage and only has before it a written transcript of their evidence. No one would seek to minimize the advantage enjoyed by the trial judge in determining any question whether a witness is or is not trying to tell what he believes to be the truth, and it is only in rare cases that an appeal court could be satisfied that the trial judge has reached a wrong decision about the credibility of a witness. But the advantage of seeing and hearing a witness goes beyond that: the trial judge may be led to a conclusion about the reliability of a witness's memory or his powers of observation by material not available to an appeal court. Evidence may read well in print but may be rightly discounted by the trial judge or, on the other hand, he may rightly attach importance to evidence which reads badly in print. Of course, the weight of the other evidence may be such as to show that the judge must have formed a wrong impression, but an appeal court is and should be slow to reverse any finding which appears to be based on any such considerations.

The authority which is now most frequently quoted on this question is the speech of Lord Thankerton in *Thomas* v. *Thomas*,[3] and particularly the passage which I now quote: "I. Where a "question of fact has been tried by a judge without a jury, and "there is no question of misdirection of himself by the judge, an "appellate court which is disposed to come to a different con-"clusion on the printed evidence, should not do so unless it is "satisfied that any advantage enjoyed by the trial judge by "reason of having seen and heard the witnesses, could not be "sufficient to explain or justify the trial judge's conclusion;

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[3] [1947] A.C. 484, 487–8; 63 T.L.R. 314; [1947] 1 All E.R. 582.

" II. The appellate court may take the view that, without having " seen or heard the witnesses, it is not in a position to come to " any satisfactory conclusion on the printed evidence; III. The " appellate court, either because the reasons given by the trial " judge are not satisfactory, or because it unmistakably so " appears from the evidence, may be satisfied that he has not " taken proper advantage of his having seen and heard the " witnesses, and the matter will then become at large for the " appellate court. It is obvious that the value and importance " of having seen and heard the witnesses will vary according to " the class of case, and, it may be, the individual case in " question."

Thomas v. *Thomas* [4] was a consistorial case based on cruelty, and I think that the whole passage which I have quoted refers to cases where the credibility or reliability of one or more witnesses has been in dispute, and where a decision on these matters has led the trial judge to come to his decision on the case as a whole. If that be right, then I see no reason to doubt anything that was said by Lord Thankerton. But in cases where there is no question of the credibility or reliability of any witness, and in cases where the point in dispute is the proper inference to be drawn from proved facts, an appeal court is generally in as good a position to evaluate the evidence as the trial judge, and ought not to shrink from that task, though it ought, of course, to give weight to his opinion. In *Riekmann* v. *Thierry* [5] Lord Halsbury said: " The hearing upon appeal is a rehearing, " and I do not think there is any presumption that the judgment " in the court below is right." And later in the same speech he said [6]: " Upon appeal from a judge where both fact and law " are open to appeal, it seems to me that the appellate tribunal " is bound to pronounce such judgment as in their view ought to " have been pronounced in the court from which the appeal " proceeds, and that it is not within their competence to say that " they would have given a different judgment if they had been " the judge of first instance, but that because he has pronounced " a different judgment they will adhere to his decision."

My Lords, there may be a difference of emphasis between this view and that expressed in the quotations given by my noble and learned friend, Lord Simonds, on the one hand, and the view expressed by Lord Thankerton and by other noble Lords and

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[4] [1947] A.C. 484.

[5] (1896) 14 R.P.C. 105, 116.

[6] Ibid. 116–7.

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learned judges to the same effect on the other hand, but I can find no essential difference between the two views, and, plainly, the present case is not one in which any question of credibility, even in its widest sense, can be said to arise. I therefore agree that the appeal should be dismissed.

LORD TUCKER. My Lords, for the reasons which have been stated by my noble and learned friend, Lord Morton of Henryton, I agree that this appeal should be dismissed. I also desire to state my concurrence in the observations which have been made by your Lordships with regard to the functions of your Lordships' House and the Court of Appeal when dealing with the findings of fact of a trial judge.

LORD SOMERVELL OF HARROW. My Lords, I agree, for the reasons given by my noble and learned friend, Lord Morton of Henryton, that this appeal should be dismissed. I would wish to add a few sentences on the point dealt with by my noble and learned friend, Lord Simonds. I would, as does he, respectfully differ from those who have suggested that an appeal on fact from a judge sitting alone is the same as, or should be assimilated to, an appeal from a jury. Apart from the fact that in the former case the appeal is a rehearing, juries do not, and judges in varying degrees do, give reasons for their conclusions. In a negligence action it may be clear on appeal from a judge alone how he has found what have been conveniently called the primary facts. An appellate court must be free to consider whether the judge, who has, I will assume, found for the plaintiff, applied the standard of the reasonable man, as our law prescribes, or the standard of a man of exceptional care and prescience.

The advantages enjoyed by the trial judge have often been stated and are, I am sure, familiar to all appellate courts. The difficult cases are those where there are circumstances which appellant and respondent can each rely on. The judge has based his decision on the way in which witnesses give their evidence. Unless there is no dispute at all he always does this. On the other hand, there are sentences in his judgment which indicate very probably but not certainly that he did not have present to his mind an answer or document which plainly affects the accuracy of a witness he has relied on, or his general conclusion. I only refer to this in order to emphasize the impossibility in my opinion of laying down anything in the nature of a code as to the

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circumstances in which an appellate court should interfere either by reversing the trial judge or ordering a new trial. I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Oscar Mason & Co.; Sharpe, Pritchard & Co. for Ryland, Martineau & Co., Birmingham.*

J. C.*
1955
March 14.

WILLIAM FRANCIS HANS . . . . . APPELLANT;

AND

THE QUEEN . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF BERMUDA.

Bermuda—Criminal law—Escape from "lawful custody"—Aiding—United States bases agreement—Arrest and confinement of United States sailor outside leased area—Release by Bermuda civilian—Whether sailor in "lawful custody"—Criminal Code (Bermuda), s. 111*—United States Bases (Agreement) Act,* 1952, *s.* 9 (1).
Criminal Law. "Lawful custody."

A sailor in the United States navy, whose leave had expired at midnight, was absent over leave and was arrested shortly after midnight in Hamilton City, Bermuda, by a United States naval shore patrol and placed in custody in the naval patrol wagon, the door of which was secured by a wire hook on the outside. Shortly afterwards, the appellant, a Bermudan civilian, released the sailor by opening the door. The incident took place on territory not included in any area leased to the United States under the United States Bases (Agreement) Act, 1952, and it was not disputed that the arrest of the sailor was lawful under United States law and that it was in respect of a matter concerning discipline within the meaning of section 9 (1) of the Act of 1952.[1] The appellant having

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* *Present*: LORD TUCKER, LORD SOMERVELL OF HARROW, and MR. L. M. D. DE SILVA.

[1] United States Bases (Agreement) Act, 1952, s. 9 (1): "United States "service courts and the authorities of "the United States of America may "exercise within these Islands in "relation to members of the United "States Forces, in matters concerning "discipline and internal administra- "tion, all such powers as are con- "ferred upon them by or under the "law of the United States of "America:

"Provided that, subject to the pro- "visions of section 8 of this Act, "nothing in the foregoing provisions "of this subsection shall be construed "so as to affect the jurisdiction of "any court of these Islands to try a "member of the United States Forces "for any act or omission which con- "stitutes an offence against the law "of these Islands."

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been convicted of unlawfully aiding the sailor "to escape from "lawful custody" contrary to section 111 of the Criminal Code of Bermuda, he appealed on the ground that as the sailor was not in custody for any offence cognizable by a Bermudan court his release was not an offence under section 111 of the Criminal Code:—

Held, that the sailor was in "lawful custody" within the meaning of section 111 when he was released. Although the language of the Criminal Code standing alone was clearly designed primarily to deal with cases arising under the Bermudan criminal law, there was no reason for restricting the meaning of "lawful "custody" to custody in connexion with criminal proceedings cognizable by the courts of Bermuda, and it extended to cover the confinement of a person whose arrest by the military was, as was the case here, authorized by Bermudan law. There was no real ambiguity in the meaning of section 9 (1) of the Act of 1952 and section 111 of the Criminal Code read together, and no sufficient express words to negative the consequences which would naturally follow according to the ordinary meaning of those two sections read in conjunction.

Appeal (No. 25 of 1954) by the appellant by special leave in forma pauperis from his conviction in the Supreme Court of Bermuda (April 23, 1953) on an indictment charging two offences of aiding one Frank R. Ashley, a person in lawful custody, to escape from such custody contrary to section 111 of the Criminal Code of Bermuda.

The following facts and statutory provisions are taken from the judgment of the Judicial Committee: Shortly after midnight on March 29, 1953, the chief petty officer in charge of a United States naval shore patrol in Hamilton City, Bermuda, finding one Ashley, a sailor in the United States navy whose leave had expired at midnight, apprehended him and placed him in custody in the naval patrol wagon, the door of which was secured by placing in position a wire hook on the outside of the door. Shortly afterwards the appellant Hans, a Bermudan civilian, seeing Ashley in the wagon where he had been left by the naval patrol, released him by opening the door. Ashley was caught and again placed in the wagon. The appellant then released him again.

The appellant was thereupon arrested by a Bermudan police officer and charged with having on two occasions aided Ashley, a person in lawful custody, to escape from such custody contrary to section 111 of the Criminal Code of Bermuda.

This incident took place on territory not included in any area leased by His late Majesty to the United States of America and referred to in the United States (Bases) Agreement Act, 1952, as a "leased area."

The two charges were heard in the magistrate's court on April 17, 1953, by L. M. Minty, Esq., J.P., who refused to commit the appellant for trial on the ground that the facts disclosed no offence against the law of Bermuda. He gave his reasons in a careful and interesting judgment.

The Solicitor-General then applied to the Supreme Court for consent to prefer a bill of indictment in respect of these charges. Consent was given by the Chief Justice, and the appellant was duly arraigned on the said indictment before the Supreme Court of Bermuda, and on April 23, 1953, he was tried and convicted on both counts before Day Kimball, Assistant Justice, and a jury. On May 9, 1953, he was fined £10 on each count. He brought the present appeal pursuant to special leave to appeal in forma pauperis granted by Order in Council dated December 22, 1953.

The sole question for decision was whether at the time of his release by the appellant Ashley was in lawful custody within the meaning of sections 110 and 111 of the Bermuda Criminal Code.

The relevant provisions of the Criminal Code and those of the United States Bases (Agreement) Act, 1952, were as follows:

THE CRIMINAL CODE.

. . . . . .

"CHAPTER XIV.

"Section 109.—(1) Any person who by force rescues or "attempts to rescue from lawful custody any other person is "guilty of a felony.

"(2) If the person rescued or whose rescue is attempted is "under sentence of death, or is charged with, or suspected of, or "committed for, any offence punishable with death, the offender "is liable to imprisonment for five years, with or without solitary "confinement. In any other case the offender is liable to "imprisonment for three years.

"(3) If the person rescued, or whose rescue is attempted, is "in the custody of a private person, the offender must have notice "of the fact that he is in such custody.

"Section 110.—Any person who, being in lawful custody, "escapes from such custody—

"(1) Is, if he has been convicted of, or is charged with, or "suspected of, or committed for, a felony, guilty of a felony, "and is liable to imprisonment for three years;

" (2) Is, in any other case, guilty of a misdemeanour, and is " liable to imprisonment for two years."

Section 111 as amended by Prisons Act, 1950.

" 111.—Any person who aids any other person in escaping or " attempting to escape from lawful custody is guilty of a mis- " demeanour, and is liable to imprisonment for two years.

" Section 112.—(1) Any person who, being an officer in either " of His Majesty's gaols in these Islands, or a police officer, " wilfully permits a person within his lawful custody to escape " is guilty of a felony.

" (2) If the person who escapes is under sentence of death, " or is charged with, or suspected of, or committed for, any " offence punishable with death, the offender is liable to " imprisonment for five years.

" (3) In any other case the offender is liable to imprisonment " for three years.

" Section 113.—Any person who, being an officer of either of " His Majesty's gaols in these Islands, or a police officer, negli- " gently permits a person within his lawful custody to escape, is " guilty of a misdemeanour, and is liable to imprisonment for " two years or to a fine of £100."

UNITED STATES BASES (AGREEMENT) ACT, 1952

. . . . . .

" Section 8.—(2) The Government of the United States of " America shall have the right to exercise the following jurisdic- " tion in respect of offences committed in these Islands, that is " to say—

" (*a*) where the accused person is a member of the United " States Forces—(i) if a state of war exists, then exclusive juris- " diction in respect of all offences wherever committed; (ii) if a " state of war does not exist, then exclusive jurisdiction in respect " of security offences wherever committed and in respect of " United States interest offences committed within a leased area, " and concurrent jurisdiction in respect of all other offences " wherever committed;

" Section 9.—(1) United States service courts and the autho- " rities of the United States of America may exercise within these " Islands in relation to members of the United States Forces, in " matters concerning discipline and internal administration, all " such powers as are conferred upon them by or under the law " of the United States of America:

"Provided that, subject to the provisions of section eight of "this Act, nothing in the foregoing provisions of this subsection "shall be construed so as to affect the jurisdiction of any court "of these Islands to try a member of the United States Forces "for any act or omission which constitutes an offence against the "law of these Islands."

"Section 12.—Where any sentence has been imposed upon "any person by a court of the United States of America sitting "in these Islands then, for the purposes of any legal proceedings "taken within these Islands, the court shall be deemed to have "been properly constituted . . . and any person who is detained "in custody in pursuance of any such sentence, or pending the "determination by such a court as aforesaid of the charge brought "against him, shall for the purposes of any such proceedings as "aforesaid be deemed to be in lawful custody.

"For the purposes of any such proceedings as aforesaid a "certificate under the hand of the United States Authorities to "the effect that a person is being detained for either of the causes "aforesaid shall be conclusive proof of the cause of his detention, "and a certificate under the hand of the United States Authorities "that the person or persons specified in the certificate constituted "the court shall be conclusive proof of that fact."

"Section 14.—(1) Any person whose surrender is requested "under arrangements made in pursuance of Article VIII of the "Agreement (which relates to the surrender of offenders) may "be arrested and surrendered in accordance with such arrange-"ments and shall be deemed to be in lawful custody—

"(*a*) while detained for the purpose of such surrender; and

"(*b*) without prejudice to any statutory provision relating "to release on bail, while detained after such surrender until the "disposal of his case."

"Section 18.—(1) Without prejudice to the provisions of sub-"section (1) of section nine of this Act, a United States constable "shall have—

"(*a*) within a leased area, all the powers and privileges of a "police officer; and

"(*b*) within a leased area, and elsewhere in these Islands on "a fresh pursuit from any such area, power to arrest without "warrant any person who he has reasonable cause to believe "has committed an offence with respect to which the Govern-"ment of the United States of America has jurisdiction by virtue "of section eight of this Act.

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"(2) A United States constable effecting an arrest in any "case where the person arrested is not released forthwith and "is not to be dealt with by a court of the United States of "America, shall without delay, and in any event within twenty-"four hours, deliver him in custody, or cause him to be delivered "in custody by another United States constable, to a police "officer, and thereupon he shall, for the purposes of any provision "of law, be treated as if he had just been arrested by a police "officer.

"(3) Where any person, having been duly arrested in accord-"ance with the foregoing provisions of this section, is detained "by a United States constable or by a police officer he shall be "deemed to be in lawful custody until his case is disposed of or "he is sooner released."

At the trial, in addition to the facts set out above, evidence was given by a captain in the United States Marines who was the legal officer at the Naval Operating Base that "absence over "leave" was a violation of Article 86 of the Uniform Code of Military Justice for which there was power to arrest, and that the arrest of Ashley by the shore patrol was a lawful arrest under the law of the United States.

At the conclusion of the case for the prosecution counsel for the appellant submitted that there was no case to answer as the facts disclosed that Ashley was not in custody for any offence cognizable by a Bermudan court and that accordingly his release by the appellant was not an offence under section 111 of the Criminal Code. The trial judge ruled against that submission, the trial proceeded and the appellant was convicted.

1955. Feb. 8, 9. *Dingle Foot Q.C.* and *Gilbert Dare* for the appellant. The fact that the Board is now entertaining this appeal is one of the unexpected consequences of the agreement which was entered into in March, 1941, between H.M. Government in the United Kingdom and the Government of the United States of America, generally referred to as "the destroyer bases "deal," under which 50 American destroyers were handed over to the Government, who agreed to lease to the United States for a term of 99 years a number of bases in the Caribbean Islands and one in Bermuda. The law of the United States applies in the bases in those territories, but the remaining area of the island has the law of the colony as laid down by the Imperial Parliament or enactments of the Colonial legislature. The United States

Bases (Agreement) Act, 1952, confers on the United States over their own nationals certain limited powers of arrest and discipline while they are in the territory of the colony outside the leased area.

At the time when he was released by the appellant Ashley was not in lawful custody within the meaning of section 111 of the Bermuda Criminal Code. The magistrate was right in holding that the acts of the appellant, even if lawfully proved, would constitute no offence against Bermuda law. The Assistant Justice wrongfully held that " lawful custody " in the Code was sufficiently broad to cover a case in which the United States authorities had lawfully arrested a United States citizen who was a member of their armed forces; and he was wrong in directing the jury that it was for them to determine whether the original arrest was a lawful arrest under the United States law. If there was anything here, there was merely an infringement of the code of naval discipline, and the particular sections of the Act of 1952 dealing with " United States interest offences " and with " security offences " have really no application to this case. Section 9 is intended to give a measure of protection to officers of the United States operating outside the leased area.

" Lawful custody " must be lawful custody within the meaning of the Criminal Code; those words have a narrower meaning than custody which is not unlawful or any custody which may be authorized by any law. The escape which is contemplated in the fasciculus of sections in the Code is an escape which is made an offence by section 110, that is, something which is an offence under the criminal law of Bermuda. Although Ashley may have committed an offence under the United States code, he has not committed any breach of the law of Bermuda, and in those circumstances the appellant cannot be convicted of anything. By " lawful custody " is envisaged something in the nature of police custody in connexion with criminal proceedings. It cannot be disputed that so far as this particular custody is concerned it is analogous to police custody, but the custody has to be lawful according to the law of Bermuda. The ruling of the trial judge rejecting the submission that there was no case to answer must be wrong. For the definition of " custody " see the Shorter Oxford English Dictionary. In *In re Watkins* [2] it was said that " lawfully " meant " ' lawfully detained ' under the provisions of " that Act "—the Lunacy Act, 1890. That decision was modified

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[2] [1896] 2 Ch. 336.

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to some extent in *In re Mark Whalley and In re W. R. Whalley*,[3] which only decides that "lawful custody" means lawfully detained under any material statute and not merely under the Lunacy Act, 1890. In *Reg.* v. *National Insurance Commissioner, Ex parte Timmis*[4] a distinction is drawn between criminal cases and other cases. Ashley did not commit any offence against Bermuda law, and so the appellant has been convicted of aiding the escape of somebody who by Bermuda law was entitled to escape. If, however, it is held that Ashley was guilty of an offence against Bermuda law, then of course it follows, and is conceded, that the appellant would be guilty under section 111. If the Criminal Code stood alone, no offence has been committed here.

Further, in the absence of express statutory provisions no court has jurisdiction to entertain proceedings designed to enforce the penal law of another country: Dicey's Conflict of Laws, 6th ed., p. 152, rule 22; *Government of India* v. *Taylor*.[5] A fortiori it may not entertain proceedings to enforce merely a code of discipline of another country.

Section 8 of the United States Bases (Agreement) Act, 1952, has no possible application to such a case as this. There is no suggestion here of anything in the nature of a "security offence," and neither "security offence" nor "United States interest "offence" have any application to this case. Further, this offence was not committed in a leased area. Section 8 does not avail the Crown in any way. In section 9 the distinction is drawn between acts and omissions which constitute offences according to the law of Bermuda and acts and offences which merely concern the discipline of the United States forces: the purpose was simply for the protection of the United States military and naval authorities. It is only in section 18 (3) that the words "lawful "custody" appear. It would have been a very simple matter to have inserted them in section 9; it was not done. Taking the Act as a whole, it would have been a simple matter to have made specific provisions to cover such a case as this, but it has not done so, and this being in effect a penal statute, it should be strictly construed. If the Crown are right in this case it would mean that the effect of section 9 is either to create a new offence or to extend the scope of an existing offence: Maxwell on Interpretation of Statutes, 10th ed., pp. 264, 285. If the Crown are right it would mean that the courts of Bermuda are required to enforce the penal law of a foreign country. There is nothing in this statute which extends the criminal law of Bermuda so as to cover such a case as this.

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[3] [1906] 1 Ch. 565.

[4] [1954] 3 W.L.R. 614; [1954] 3 All E.R. 292.

[5] [1955] 2 W.L.R. 303; [1955] 1 All E.R. 292.

D. A. Grant for the Crown. The words " lawful custody " in section 109 of the Criminal Code include the custody of a person lawfully placed under arrest by the United States authorities for an offence under the United States law; and by the word " lawful " is meant lawfully placed under arrest both under United States law and also the law of Bermuda. Section 9 of the Act of 1952 empowered the United States authorities to arrest persons like Ashley who committed offences against United States law. It is immaterial whether the person under arrest has committed any offence against Bermuda law. It is also immaterial whether he is to be tried for that offence by a United States court or by a Bermuda court. This case falls within section 9, but it is also a " United States interest offence " which would come under section 8 as well.

The material words of section 109 of the Criminal Code are as wide as they could possibly be: the last words of section 109 (2) are " in any other case . . ."—there is no restriction at all. Those same words also appear in section 110 (2). " Custody " admittedly must be interpreted strictly, and must mean confinement or restriction of liberty in some way, and the custody here is clearly of that type. What is not accepted, however, is that the word " lawful " should be confined in any way at all. It simply means " permitted or authorized by law." If a person is in that type of custody the only question is whether that confinement is lawful, and the proper test for that is whether a writ of habeas corpus would lie. Ashley was in custody which was lawful under the law of Bermuda and it was lawful custody under section 111 of the Code.

With regard to the Act of 1952, a breach of discipline may also be a breach of the common law and the Criminal Code of Bermuda, and a man may be prosecuted for both. The effect of the Act is not to take United States servicemen out of the jurisdiction of the Bermuda court, even though it is a matter of discipline; even then the civil courts can deal with the matter, though as a matter of practice they will not. The sections of the Act where the words " lawful custody " appear are really dealing with cases where a person has come under the jurisdiction of the United States by virtue of this Act, and the purpose of those provisions in saying that his detention shall be lawful custody is

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to prevent him alleging thereafter that he has been improperly put into custody by the United States authorities: sections 12, 14 (1), 18 (3). It is clear from section 9 (1) and the proviso that it was contemplated that a breach of discipline might also be a breach of the law of Bermuda. If, then, an American soldier who has committed a very serious offence outside the leased area, and has been arrested by his service police, is not in lawful custody and can be released by any civilian, that is a result which nobody could have contemplated. It is submitted that that is not the law.

Dingle Foot Q.C. in reply. The only way in which one can limit the words "in any other case" in section 109 (2) of the Code, and the words "lawful custody" in sections 110 and 111, is to say that one is in the realm of criminal law. With regard to the appearance of "lawful custody" in sections 12, 14 (1) and 18 (3) of the Act of 1952, in each case one is dealing with the operation of the criminal law. If there is any ambiguity here it ought to be resolved in the appellant's favour, but it is submitted that there is none.

March 14. The judgment of their Lordships was delivered by LORD TUCKER, who stated the facts and statutory provisions set out above and continued: As there is now no dispute as to the facts the present appeal is in effect an appeal against the trial judge's rejection of the submission that there was no case for the defence to answer.

It is not disputed that the arrest of Ashley was lawful under United States law, and that it was in respect of a matter concerning discipline within the meaning of section 9 (1) of the United States Bases (Agreement) Act, 1952. He was accordingly in custody and the custody was authorized by Bermudan law, but it is contended that he was not in "lawful custody" within the meaning of sections 110 and 111 of the Criminal Code, which should be construed as restricted to custody in connexion with criminal proceedings cognizable by the courts of Bermuda, or at any rate to custody authorized by Bermudan law as a preliminary to or a consequence of some order or judgment or process issuing out of a Bermudan court. The context of these sections read with sections 112 and 113 is relied upon.

It was further contended that there was nothing in the United States Bases (Agreement) Act, 1952, to extend the meaning of sections 110 and 111 of the Code. In this connexion the following matters were put forward in support of the appellant's contention:

(1) If Ashley was in lawful custody within the meaning of section 111, he was himself guilty of an offence under section 110 for which he could have been tried by a Bermudan court. (This was accepted on behalf of the Crown.) It was said that only the clearest language would suffice to attribute to the legislature the intention to bring about such a result. (2) That the express words in sections 12, 14 and 18 of the United States Bases (Agreement) Act providing that detention in the circumstances therein provided should be "deemed to be lawful custody" and the absence of any such words in relation to section 9 (1) negatived the construction for which the Crown contended. (3) That ambiguous language will not suffice to enlarge the scope of a statute creating criminal offences.

These submissions merit and have received careful consideration.

Although the language of the Criminal Code standing alone is clearly designed primarily to deal with cases arising under the Bermudan criminal law, and the words "lawful custody" would not include, for example, the custody of an infant by his parent or guardian, their Lordships can see no reason for restricting their meaning in the manner for which the appellant contends. If Bermudan law at any time authorizes arrest for any reason by the military of civilians or service personnel it is difficult to see why the person so arrested and kept in confinement should not be considered as in lawful custody within the meaning of sections 110 and 111, or why the status of the particular person authorized to make the arrest should be the criterion for deciding whether or not it is lawful within the meaning of these sections. With regard to the United States Bases (Agreement) Act, 1952, it is to be observed that section 9 (1) and the proviso thereto, which is the section relied upon by the Crown, covers breaches of United States military discipline which may also constitute offences triable by the Bermudan courts. Such offences may include serious crimes which are also offences against discipline. If the United States authorities are given authority to arrest for such offences outside the leased area it would be natural to suppose that the legislature would intend that such arrests should be effective and that Bermudan citizens should not be able with impunity to release persons whose arrest the legislature has authorized. It would accordingly, in their Lordships' opinion, require express words to negative the consequences which would naturally follow according to the ordinary meaning of section 9 (1) of the United States Bases (Agreement) Act, 1952, read in conjunction with section 111 of the Criminal Code, and the express words in sections 12, 14 and 18, which may have been inserted ex abundanti cautela in relation to cases which would include the detention of Bermudan civilians, are not sufficient to compel a different construction of section 9 (1). It is true that at first sight it would appear surprising that the result of section 9 (1) should be to render the escaping United States soldier or sailor liable to prosecution in the Bermudan courts, but in practice the provisions of section 10, which require the consent of the Attorney-General in writing to any such proceeding, would probably make any such liability more theoretical than real.

In the result their Lordships have reached the conclusion that there is no real ambiguity in the meaning of the two most relevant sections of the two statutes read together and will accordingly humbly advise Her Majesty that the appeal should be dismissed.

Solicitors: *A. L. Bryden & Williams; Charles Russell & Co.*

PORT OF SPAIN CORPORATION . . . APPELLANTS;
AND
GORDON, GRANT & CO. LD. . . . RESPONDENTS.

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1955
Mar. 14.

ON APPEAL FROM THE SUPREME COURT OF TRINIDAD AND TOBAGO.

Trinidad and Tobago—Rates and rating—Assessment—Rateable value—Rent restriction legislation—Application—"Standard rent" the value for purpose of rate—English principle inapplicable—Port of Spain Corporation Ordinance (Revised Ordinances of Trinidad and Tobago, 1950, *c.* 39, *No.* 1), *ss.* 89, 101, 114*—Rent Restriction Ordinance (Revised Ordinances,* 1950, *c.* 27, *No.* 18), *ss.* 3 (1), 8, 9. *Rates and Rating.*

Privy Council—Appeal—Leave to appeal—Jurisdiction of colonial court—Trinidad and Tobago—Decision of Supreme Court on appeal from court of summary jurisdiction—Jurisdiction to grant leave to appeal to Privy Council—Order in Council, April 2, 1909, *r.* 2.

The ratio of the decision of the House of Lords in *Poplar Metropolitan Borough Assessment Committee* v. *Roberts* [1922] 2 A.C. 93; 38 T.L.R. 499 that the Rent Restriction Act of 1920 has no effect on valuations for rating under English law is to be found in the English rating system, under which the rate is a tax on occupiers in respect of their occupation and is not concerned with the landlord or owner's interest. That decision has no application in determining the rateable value of premises in Trinidad where, under the relevant provisions of the Port of Spain Corporation Ordinance, the rate is borne by the owner, is a charge on the rateable hereditament, and is exigible if there is no occupier. In determining, therefore, the rateable value of such premises regard must be had to the Trinidad Rent Restriction Ordinance, 1941, as amended, which affects the annual rent payable to and exigible by the landlord, and the value of the hereditament for rating purposes is the amount of the "standard rent" which has been fixed in accordance with the provisions of the Rent Restriction Ordinance.

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* *Present*: LORD TUCKER, LORD COHEN, LORD SOMERVELL OF HARROW and MR. L. M. D. DE SILVA.

Judgment of the Supreme Court of Trinidad and Tobago affirmed.

The Full Court of the Supreme Court of Trinidad and Tobago has jurisdiction under rule 2 of the (Imperial) Order in Council of April 2, 1909, to entertain an application for leave to appeal to Her Majesty in Council from a decision of the Full Court on an appeal from a court of summary jurisdiction.

Griffith v. *Pillai*, judgments delivered in the Supreme Court of Trinidad and Tobago, vol. 12 (1951–2), 39 overruled.

Judgment of the Supreme Court of Trinidad and Tobago reversed on this point.

APPEAL (No. 7 of 1954), by special leave, from two judgments of the Full Court of the Supreme Court of Trinidad and Tobago (April 30 and June 13, 1953, respectively). The first appeal was from a decision of the Supreme Court reversing an order of a magistrate in respect of the rateable value of 78, South Quay, Port of Spain. The second appeal was on a procedural issue.

The following facts and statutory provisions are taken from the judgment of the Judicial Committee: The appellants were the rating authority for the city of Port of Spain. The respondents were the owners of 78, South Quay, which was at all material dates let to the Archer Coal Depot Co. Inc.

The question was whether the rent restriction legislation had any and, if so, what effect on the determination of the rateable value.

In *Poplar Metropolitan Borough Assessment Committee* v. *Roberts*[1] the House of Lords decided that the Rent Restriction Act of 1920 had no effect on valuations for rating under English law. The magistrate in this case decided that the principle laid down in that case applied notwithstanding differences between both the rating and the rent restriction law in Trinidad and

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[1] [1922] 2 A.C. 93; 38 T.L.R. 499.

England. The Supreme Court (Mathieu-Perez C.J. and Ward J.) held that the principle of the *Poplar* case did not apply and that the value of 78, South Quay, for the purposes of the rate was the amount of the " standard rent " which had been fixed in accordance with the provisions of the Rent Restriction Ordinance.

The Full Court based their decision on the differences between the two rent restriction codes and not on the differences between the two rating codes.

The law as to the rating of 78, South Quay, was to be found in the Port of Spain Corporation Ordinance (Revised Ordinances 1950, c. 39, No. 1): " Section 87. In this part of this Ordinance " ' rateable hereditament ' means any dwelling-house, ware-" house, store, shop, counting-house, manufactory, factory, work-" shop, stable, shed, and any other building whatsoever in the " city, and the lands on which the same respectively are built, " erected, or standing, together with any other lands appur-" tenant to or occupied with the same respectively; and includes " every vacant parcel of land in the city not appurtenant to or " occupied with any house, warehouse, store, shop, counting-" house, manufactory, factory, workshop, stable, shed, or any " other buildings; but shall not include—(*a*) buildings occupied " solely as churches, chapels, and places of public worship of " any religious denomination; (*b*) school-houses, offices, and " play-grounds of any elementary or intermediate school estab-" lished under the Education Ordinance; (*c*) hospitals, whether " public or private, asylums, almshouses, and institutions for the " relief of the poor, whether occupied for such purposes by public " officers or by private persons; or (*d*) quarters occupied rent free " by the members of the staff of any of the institutions referred " to in the preceding paragraph and within the curtilage thereof; " . . . ' premises ' means rateable hereditament as defined above; " ' annual rateable value ' means the gross annual rental value, " subject only to such deductions and allowances as the corpora-" tion may make under this Part of this Ordinance."

" Section 88 (1). There shall be raised, levied, and collected " by and paid to the corporation upon and in respect of every " rateable hereditament an annual rate or tax of seven and a " half per centum of the annual rateable value of such heredita-" ment as determined by the corporation in accordance with the " provisions of this Part of this Ordinance."

Subsection (2) provided that the rate might be raised to ten per cent.

"Section 89 (1). In determining the annual rateable value of "any rateable hereditament for the purposes of this Ordinance, "the corporation shall, whether such hereditament be actually "rented or not, consider in every case what amount of annual "rent a tenant may be reasonably expected to pay for such "hereditament, having regard to the purpose for which such "hereditament is actually used or, in case it is not actually used "or occupied, the purpose or purposes for which it is reasonably "suitable."

This section read with the definition was similar for present purposes to the provisions as to valuation in the Valuation (Metropolis) Act, 1869, s. 4, which was considered in the *Poplar* case.[2] The application of either section required the consideration of what a hypothetical tenant would pay.

"Section 101. The annual rate or tax to be paid in respect of "every rateable hereditament under this Part of this Ordinance "shall be borne and paid by the owner of such hereditament, but "the amount of such rate may be collected from and paid by the "tenant or occupier of such hereditament or any part thereof, "and such tenant or occupier may deduct the amount so paid "from the rent payable by him in respect of such hereditament: Provided that nothing herein contained shall affect any "contract between landlord and tenant with respect to the "payment of such rate."

There followed provisions for appeal to the magistrate and from his decision to the Full Court.

"Section 114. Any rates due under this Part of this Ordinance, together with any statutory increase which may have "accrued under the provisions of this Ordinance, shall, until "paid, be a charge on the rateable hereditament in respect "whereof such rate is due and payable; and, without prejudice "to such charge, and to the power of sale conferred by the "Rates and Charges Recovery Ordinance, the amount of such "rates, together with the statutory increase (if any), may be "recovered from the owner for the time being of such rateable "hereditament by action in any court of competent jurisdiction "or by distress on any goods and chattels (including any "movable tenement standing on land forming part of the rateable "hereditament) which may be found in or upon such rateable "hereditament: . . ."

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[2] [1922] 2 A.C. 93.

The Rent Restriction Ordinance (Revised Ordinances 1950, c. 27, No. 18) provided, as did the Rent Act of 1920, for a standard rent with permitted increases which placed a limit on what the landlord could exact.

1955. Feb. 15, 16, 17. *D. N. Pritt Q.C.* and *John Platts-Mills* for the appellants. There are two appeals, the first of which is of general application. The question arising on the second appeal is an important one of construction as to the jurisdiction of the Supreme Court to entertain applications for leave to appeal to Her Majesty in Council from judgments of the Supreme Court given on appeals from summary courts. The Port of Spain in general make valuations for rating on the English lines, and the question in the first appeal is whether the English ruling in *Poplar Metropolitan Borough Assessment Committee* v. *Roberts* [3] to the effect that in arriving at the valuation for rating the Rent Restrictions Acts had no application ought to apply in Port of Spain. The appellants say that it should apply. The Supreme Court concluded that there are some differences both in rating law and rent restriction law between the two countries which enabled them to find distinctions and to hold that the principle applied in England did not apply in Port of Spain. The appeal is important because a number of cases are depending on it, and because the rating legislation in three or four major cities in Trinidad is substantially the same as in Port of Spain. It is particularly important because in Port of Spain, which relies upon rates for two-thirds of the income of the city, they are not allowed to charge more than 10 per cent. of the rateable value for rates.

There are some differences between the rent restriction legislation in Trinidad and this country, in particular in Trinidad the receipt or even the payment of rent beyond the restricted rent is made specifically criminal. The principal difference between the rating legislation of Trinidad and Britain is that in the former liability for rates is laid upon the owner. Looking at the matter generally, in both jurisdictions the provisions as to how one assesses what ought to be paid are identical; the difference between the two relates to the person from whom the rating authority can collect the money due, and in England it is the occupier in the ordinary case, and in Trinidad the owner is primarily liable, but there are many ways of collecting from the occupier as well, and there are broader ways of collecting in the sense that the rate is made a charge on the land, and it is submitted that the owner was obviously made liable in Trinidad as the only way of dealing with a rating system under which they had decided on the economically very important policy of making equally rateable occupied and unoccupied tenements. [Reference was made to Ryde on Rating, 9th ed., pp. 8, 9.]

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[3] [1922] 2 A.C. 93.

It is submitted that no material distinction is to be drawn between the *Poplar* case [3] and the present case because (1) the Rent Restriction Ordinance was less and not more permanent than the Increase of Rent and Mortgage Interest (Restrictions) Acts, 1920–39; (2) the fact that in Port of Spain a penal sanction obtains to enforce rent restriction legislation does not make any difference in principle; (3) the governing consideration both in Port of Spain and in England is the amount of rent which a hypothetical tenant might reasonably be expected to pay, and there is no distinction to be drawn between the reaction of the hypothetical tenant in the two jurisdictions. The central argument is quite simply that the *Poplar* case [3] is in principle a binding authority which bound the courts of Trinidad, and for that reason they ought to have decided in favour of the appellants here. *Rawlance* v. *Croydon Corporation* [4] is a little assistance to the appellants here, and helps to make the matter a little clearer. Although this is a rate levied on the owner, yet it is nevertheless just as much as in England a rating on the beneficial occupational value to the occupier. The laying of the burden on the owner in Trinidad and on the occupier in England is, of course, a very big distinction, but it would not appear to make any difference in itself. And, secondly, the difference as to who actually pays is mere machinery. The annual rateable value should be based upon the amount of rent that a tenant might reasonably be expected to pay having regard to the purpose for which the premises are actually used or are reasonably suitable. The Rent Restriction Ordinance does not affect the rateable value of any hereditament falling within the Ordinance.

With regard to the second appeal, the Supreme Court said that they could not give leave to appeal to this Board in a civil case if it came to them from a lower court, with the result that in cases which may be of some little importance litigants in Trinidad, instead of getting leave from the Supreme Court, have to come here and ask for special leave. The Full Court considered itself bound on this point by a previous decision of the court in *Griffith* v. *Pillai*,[5] in which the judgment of the Full Court stated: "The rule [rule 2 of the Order in Council of April 2, 1909] says "an appeal shall lie as of right from a final judgment of the "court, etc., and 'Court' is defined [in the Order in Council] "as meaning: "Either the Full Court or a single judge of the "'Supreme Court of Trinidad and Tobago according as the matter "'in question is one which, under the Rules and Practice of the "'Supreme Court, properly appertains to the Full Court or to "'a single judge.' An appeal from a court of summary jurisdic-"tion, or as it is better known, a magistrate's court, is governed "wholly by statute, and consequently this matter is not one "which, 'under the Rules and Practice of the Supreme Court, "'properly appertains to the Full Court.'" Rule 2 is intended to deal with judgments of the Supreme Court, and all that the definition does is to say that when one says Supreme Court one may mean the Full Court or a single judge according as the matter properly appertains to the one or the other, and in cases like this, where the appeal from the court of summary jurisdiction is brought in practice before the Full Court, then it is a matter before the Supreme Court under the Rules and Practice of the Supreme Court and properly appertains to the Full Court and that court can give leave to appeal. It was intended to provide an appeal by rule 2 of the Order in Council from a decision of the Supreme Court, whether of the Full Court or a single judge, and whether original in that court or whether it has come up by way of appeal. The Full Court has jurisdiction to entertain applications for leave to appeal to Her Majesty in Council from decisions of the Supreme Court given on appeals from courts of summary jurisdiction.

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[3] [1922] 2 A.C. 93.

[4] [1952] 2 Q.B. 803; [1952] 2 T.L.R. 460; [1952] 2 All E.R. 535.

John Senter Q.C. and *Roderick Watson* for the respondents. The court is not concerned with a hypothetical tenant in this case at all. The case for the respondents can be put in this way: if it is correct to say, as it is submitted it is, that the principle of rating in Trinidad is to tax ownership, then two consequences follow: (1) the *Poplar* case[6] is distinguishable, and a good deal of the reasoning in that case is in favour of the respondents here[7]; and (2) if one is concerned with the concept of ownership the rent restriction legislation must be taken into account; support for this view is to be found in the *Poplar* case [6] itself and in the reasoning in *Rawlence* v. *Croydon Corporation.*[8] There is a vital distinction between the two systems, and it is difficult to see how the appellants get any assistance from the *Rawlence* case.[8] The machinery for fixing the permitted rent was followed here. The duty of the Board was to fix the standard rent on the evidence before it, and the evidence here is that the parties were at arm's length, and there is no justification for thinking that the figure of $132 a month is in any way artificial.

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[5] Judgments in the Sup.Ct. of Trinidad and Tobago, vol. 12 (1951–2), 39.

[6] [1922] 2 A.C. 93.

[7] Ibid. 102, 106, 113, 118, 121.

The second basic submission is that having regard to the legislation under consideration the argument for the appellants gives no reasonable meaning to the word " reasonably " in section 89 (1) of the Port of Spain Corporation Ordinance. The words " the annual rent which a tenant may *reasonably* be expected to " pay " in that section refer to the annual rent which the owner could obtain having regard to all the relevant circumstances, including the effect of legislation currently in force in the colony. Taking the rating legislation of Trinidad by itself, there is no question of any hypothetical tenant; this is a tax coming out of the pocket of the owner of the rateable premises. It is a plain charge which operates on the owner without any qualification, and it is quite different from the position in England.

The respondents have a standard rent, fixed presumably under the rather elaborate proceedings of these boards, and where there is a provision in terms that it is an offence for the landlord to take more, that links up with the test of what the tenant might reasonably be expected to pay. Having regard to this penal sanction the position in Trinidad is radically different from that in England; and if that be right, it follows that the magistrate was clearly wrong in regarding this case as being concluded by the *Poplar* case.[9] It is desired to support the second part of the judgment of the Supreme Court.

Pritt Q.C. in reply. If there were any big distinction in principle between the *Poplar* case [9] and this, then the former might be distinguished; but it should not be distinguished on fine points. There is no distinction in principle. In section 89 (1) of the Port of Spain Corporation Ordinance it is not possible to discover any basis except the English basis—occupational value to the tenant—and the whole of the reasoning in the *Poplar* case [9] applies, and that should be the beginning and end of the case. " Reasonably " in section 89 (1) means on a reasonable calculation of all the circumstances how much will a hypothetical tenant pay to get the particular premises.

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[6] [1922] 2 A.C. 93.
[8] [1952] 2 Q.B. 803.
[9] [1922] 2 A.C. 93.

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March 14. The judgment of their Lordships was delivered by LORD SOMERVELL OF HARROW, who stated the facts and statutory provisions set out above and continued: The respondents before us relied in the first instance on the differences between the rating codes and it will be convenient to deal with that first.

It will be seen that the basis of the tax differs from that of rating under English law. Under the latter the rate is imposed upon the occupier. There must be an occupier or there is no rate. Not only is it not imposed on the owner, but it is not a charge on the land. If the rate is not paid the authority's remedy is by distress and sale of the goods of the occupier.

In Trinidad the rate is borne by the owner; it is a charge on the rateable hereditament; it is exigible if there is no occupier.

In the *Poplar* case [1] the Divisional Court and the Court of Appeal by a majority had held that the gross value of a building for rating purposes could not be greater than the standard rent with permitted increases under the Rent Act of 1920.

That decision was reversed, by a majority, in the House of Lords [2] who held that the Act was not to be taken into account. In the opinion of the Board the ratio of that decision is to be found in the English rating system, namely, that the rate is a tax on occupiers in respect of their occupation and is not concerned with the landlord or owner's interest. Lord Buckmaster said [3]: "So far as the occupier is concerned, the provisions of the "Rent Restriction Act have not in any way made his occupation "less beneficial. It is the landlord who is affected, and he, as "landlord, is not the subject of assessment, nor can his interest "in the property be considered for the purpose of determining "what that assessment should be." Lord Sumner [4] and Lord Parmoor [5] emphasize the distinction between occupier and owner for purposes of rating valuation under English law.

In *Rawlance* v. *Croydon Corporation* [6] the Court of Appeal had to consider the ratio of the *Poplar* case [7] and came to the same conclusion as stated above.

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[1] [1922] 1 K.B. 25; 37 T.L.R. 980.

[2] [1922] 2 A.C. 93.

[3] Ibid. 103.

[4] Ibid. 116.

[5] Ibid. 118, 123.

[6] [1952] 2 Q.B. 803; [1952] 2 T.L.R. 460; [1952] 2 All E.R. 535.

[7] [1922] 2 A.C. 93.

The *Poplar* decision[7] therefore having no application, the Board is clear that, under Trinidad law, regard must be had to the Rent Restriction Ordinance, which affects the annual rent payable to and exigible by the landlord.

There are references in the speeches in the *Poplar* case[7] to the inequalities which would be produced as between hereditaments subject to the Rent Act and those not so subject if for rating purposes regard was had to the Rent Restriction Act. The contributions from the former would be based on their rents at the appointed day, the latter's would rise if the general level of rental values rose. These references will be found in the speeches of Lord Atkinson, Lord Sumner and Lord Parmoor. In the opinion of the Board these observations were by way of reinforcing the conclusion rather than its basis. If, however, they were a substantial ingredient in the conclusion they do not apply to the Trinidad Rent Restriction code (Revised Ordinances 1950, c. 27, No. 18). They were based, as has been said, on the fact that the Rent Act of 1920 applied to dwelling-houses whose standard rent or rateable value were below a certain amount. Other dwelling-houses were unaffected, as were business premises.

Under section 3 (1) of the Trinidad Ordinance the restrictions apply to all building land, dwelling-houses and public or commercial buildings. Rent Assessment Boards are appointed to settle standard rents. Prima facie the standard rent is that at which the premises were let on the prescribed day, or if not so let then at which they were last so let before or first so let after that day. This is similar to the definition in section 12 of the Act of 1920. The Trinidad system is, however, more flexible. If it can be shown that the actual rent was above or below the general level of rents for similar premises in the same locality on the prescribed day the board can adjust the standard rent accordingly (section 9).

If premises had never been let the landlord was unrestricted under the Act of 1920 should he desire to let. Under the Ordinance it is his duty to apply to the board to fix a provisional standard rent, which will be done with reference to similar lettings of similar premises on the prescribed date (sections 8 and 9). It is not necessary to consider these provisions further. Their Lordships think that the Full Court were justified in describing them as designed to secure a uniform standard of rents.

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[7] [1922] 2 A.C. 93.

The Full Court attached importance to the provision (section 10 (3)) under which it is a criminal offence for a landlord knowingly to receive, or a tenant knowingly to pay, rent in excess of the standard rent. Their Lordships think that the position so far as the present issue is concerned would be the same if the sanctions were civil and not criminal.

A subsidiary submission was made on behalf of the appellants which makes it necessary to set out some dates and figures. The rent of 78, South Quay, on the prescribed day was $120 per month, with a permitted increase as from July, 1947, of $12 a month. In the period 1948–50 the rateable value was $1,608 a year, which represents $134 a month. No point was taken as to the difference of $2 a month. In the period 1951–53 the appellants caused a new valuation to be made of $6,600 a year. The respondents lodged notice of appeal to the magistrate on October 24, 1951. On November 9, 1951, on the application of the respondents the Rent Assessment Board, after hearing evidence, determined the standard rent at $132 per month. On May 7, 1952, the magistrate heard the appeal and, after hearing evidence and disregarding the Rent Restriction Ordinance, fixed the annual rateable value at $5,760. At the hearing before the magistrate the respondents' secretary, in answer to a question in cross-examination, said that the premises could have been let on the prescribed day, namely, January 1, 1940, for $400 to $480 per month.

It was suggested that if this evidence had been before the Assessment Board and accepted, a higher rent should have been fixed in accordance with the provisions of the Ordinance. No sort of mala fides was suggested. It would, of course, have been in the interest of the respondents to get the rent fixed higher. This point was not taken below and the Board are clear it cannot be taken here. It was not suggested that a party could go back to the Assessment Board merely because he had failed to call relevant evidence which might have assisted him. This appeal proceeds on the basis of a proper determination by the Assessment Board of a standard rent, and their Lordships are of opinion that the Full Court were right in reducing the figure as they did.

Their Lordships were invited to give guidance as to how in different cases regard should be had to the Rent Restriction code. In cases where the standard rent with any permitted increases has been, as here, fixed by a board, the question is simple. If there has been no determination by the board, or if it is submitted that a further application could be made to the board, there would appear to be no great difficulty once it is clear, as it is, that the hypothetical tenant is subject to the restrictions. There may be cases where the court dealing with a valuation might think it right to adjourn pending an application to the board. That would depend on circumstances and would be a matter for the court. There will be other cases in which the court dealing with the rateable value will have itself to make an estimate of the figure which the board would fix. A simple example is that of premises which the owner has never let and does not intend to let.

The procedural issue arose on the construction of rule 2 of the Order in Council of April 2, 1909, dealing with appeals to their Lordships' Board. Rule 2 is as follows—" Subject to the " provisions of these Rules an appeal shall lie:—(*a*) as of right, " from any final judgment of the court, where the matter in " dispute on appeal amounts to or is of the value of £300 " sterling or upwards or where the appeal involves directly or " indirectly some claim or question to or respecting property or " some civil right amounting to or of the value of £300 sterling " or upwards; (*b*) at the discretion of the court, from any other " judgment of the court, whether final or interlocutory, if in the " opinion of the court the question involved in the appeal is one " which by reason of its great general or public importance or " otherwise ought to be submitted to Her Majesty in Council " for decision."

The appellants having lost before the Full Court applied under rule 2 (*a*). The Full Court (Gomes and Ward JJ.) decided that it was bound by its previous decision in *Griffith* v. *Pillai* [8] to hold that rule 2 (*a*) did not apply. The appellants therefore petitioned for special leave, which was not opposed and was granted on October 28, 1953.

Pillai's case [8] was also an appeal from a magistrate. The appeal was one which under the Judicature Act, section 32 (3) (*a*), went to the Full Court. In the present case the appeal was to the Full Court under section 105 (1) of the Port of Spain Corporation Ordinance. The decision in the *Pillai* case [8] was based on the construction of the definition of " Court " in the Rules. The reason is set out in the following paragraph:—" The " rule says an appeal shall lie as of right from a final judgment

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[8] Judgments in the Sup.Ct. of Trinidad and Tobago, vol. 12 (1951–2), 39.

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"of the court, etc., and 'Court' is defined as meaning: 'Either "'the Full Court or a single judge of the Supreme Court of "'Trinidad and Tobago according as the matter in question is "'one which, under the Rules and Practice of the Supreme "'Court, properly appertains to the Full Court or to a single "'judge.' An appeal from a court of summary jurisdiction, or "as it is better known, a magistrate's court, is governed wholly "by statute, and consequently this matter is not one which, "'under the Rules and Practice of the Supreme Court, properly "'appertains to the Full Court.' For these reasons the petition "is dismissed with costs."

It would seem a curious result if rule 2 (*a*) applied when the question of Full Court or single judge was determined by Rule or Practice and not when it was determined by a statute. While appreciating the grammatical basis of the decision, the Board cannot accept it. The words relied on would seem to have been inserted in the definition by way of exposition rather than of limiting the scope of rule 2 (*a*). The fact that the exposition is incomplete does not justify construing it as limiting the right of appeal. The Full Court in the present case clearly had doubts as to the correctness of the decision in *Pillai's* case[8] but felt themselves bound by the principle of stare decisis.

For the reasons already given the Board will humbly advise Her Majesty that the main appeal be dismissed and the procedural appeal be allowed.

On the question of costs, the respondents below opposed the application for leave as of right under rule 2 (*a*). They took no part in the argument on that point before the Board. The order as to costs made below on the procedural issue will be set aside and there will be no order for costs in respect of the order of June 13, 1953. The costs of the proceedings before the Board will be borne by the appellants.

Solicitors: *Druces & Attlee; J. N. Mason & Co.*

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[8] Judgments in the Sup.Ct. of Trinidad and Tobago, vol. 12 (1951–2), 39.

J. C.*

1954
Nov. 10.

ERIC LANG . . . . APPELLANT;

AND

JEAN WAUCHOPE LANG . . . . RESPONDENT.

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

Australia (Victoria)—Husband and wife—Divorce—Desertion—Constructive desertion—Inference from conduct—Proof of intention—Rebuttable—Intention from conduct not rebutted by co-existing desire that spouse should remain—Conflicting "intention" and "desire"—Marriage Act, No. 3726 *of* 1928 (*Victoria*), *ss.* 75, 77. *Husband and Wife.*

Where a husband's conduct towards his wife was such that a reasonable man would know—that the husband must have known—that in all probability it would result in the departure of the wife from the matrimonial home, that, in the absence of rebutting evidence, was sufficient proof of an intention on his part to disrupt the home, and the fact that he nevertheless desired or requested her to stay did not rebut the intention to be inferred from his acts—that he intended to drive her out—and he was guilty of constructive desertion. A man may have an intention which conflicts with a desire, and here his intention was to act as he did, whatever the consequences, though he might have hoped and desired that they would not produce their probable effect.

View in *Bain* v. *Bain* (1923) 33 C.L.R. 317, at 325, approved.

Moss v. *Moss* (1912) 15 C.L.R. 538, *Baily* v. *Baily* (1952) 86 C.L.R. 424, *Dearman* v. *Dearman* (1916) 21 C.L.R. 264, and *Deery* v. *Deery* (1954) Argus L.R. 262 considered.

The two conflicting views on constructive desertion to be extracted from the English authorities as expressed by Denning L.J. in *Hosegood* v. *Hosegood* (1950) 66 T.L.R. (Pt. 1) 735, 738—(1) that a husband is not to be found guilty of constructive desertion, however bad his conduct, unless he had in fact an intention to bring the married life to an end (*Boyd* v. *Boyd* (1938) 55 T.L.R. 3; [1938] 4 All E.R. 181), and (2) that if his conduct is so bad or so unreasonable that his wife is forced to leave him, he must be presumed to intend her to leave however much he may in fact desire her to remain (*Sickert* v. *Sickert* [1899] P. 278, 283–4; 15 T.L.R. 506, and *Edwards* v. *Edwards* [1948] P. 268; 64 T.L.R. 61; [1948] 1 All E.R. 157) considered.

Judgment of the High Court of Australia (1953) 86 C.L.R. 432 affirmed.

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* *Present*: LORD PORTER, LORD OAKSEY, LORD REID, LORD TUCKER, and LORD ASQUITH OF BISHOPSTONE.

[Reported by CHARLES CLAYTON, Esq., and Miss ELAINE JONES, Barristers-at-Law.]

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v.
LANG.

APPEAL (No. 26 of 1953), by special leave granted on May 28, 1953, from a judgment of the High Court of Australia (Dixon C.J., Fullagar and Kitto JJ.) (February 23, 1953) dismissing the appeal of the present appellant from a judgment of the Supreme Court of Victoria (Lowe J.) (September 22, 1952) whereby it was adjudged that the present respondent should be granted a decree nisi of dissolution of marriage with costs on the ground of the present appellant's constructive desertion.

The parties were married in South Australia on November 8, 1924. On October 29, 1951, the wife presented a petition to the Supreme Court of Victoria praying for a divorce on the ground that her husband had without just cause or excuse wilfully deserted her and had continued in desertion for three years and upwards.

The appellant denied that he had been guilty of constructive desertion.

The facts appear from the judgment of the Judicial Committee.

1954. July 19, 20, 21, 22, 26, 27, 28, 29 and 30. *James Stirling*, *B. Buller-Murphy* (Australia) and *B. J. Watley* for the appellant. The doctrine of constructive desertion is of such a limited nature that the circumstances proved in evidence in this suit lie outside it. Such doctrine does not include as constituting constructive desertion " a course of conduct which any reasonable " person would regard as calculated to bring about such a result " in the absence of an express as opposed to a constructive intent to bring the matrimonial consortium to an end. The appellant did not possess the animus or state of mind requisite to prove that he had been guilty of constructive desertion.

In *Baily* v. *Baily*[1] the second limb of the test for intention laid down in *Bain* v. *Bain*[2] was clarified as being merely the test for an inference of fact from which could be inferred an intention to drive out. Where there is conduct which might be considered as capable of driving the other spouse out it is submitted that an actual expression of intention that the other spouse should remain would be sufficient to negative the conduct. If the test in *Bain* v. *Bain*[3] be held to cover the case of a sadistic husband who nevertheless wished his wife to remain, then that test is incorrect. A sadist is not a husband with a deserting mind. Both *Bain*[4] and *Baily*[5] show that the presumption is one of fact and not of law. There must be knowledge by the husband that the effect of his conduct upon the wife would be to drive her out. In *Pizzala*[6] and the other adultery cases there was an actual presumption of such knowledge which was not rebutted.

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[1] (1952) 86 C.L.R. 424.

[2] (1923) 33 C.L.R. 317.

[3] Ibid.

[4] Ibid.

The history of constructive desertion in Australia was that at first the courts required an actual intention. Then came *Moss* v. *Moss*,[7] which said that intention might be presumed and which purported to follow *Sickert* v. *Sickert*,[8] but which, it is submitted, misinterpreted that case. In *Sickert* v. *Sickert*[9] the court found a definite intention, and the judge was far from saying that actual intention was immaterial. The husband had had warnings and reliance is placed upon this, although, of course, warnings cannot transform a trivial act into a grave and weighty one. What that case stated was that the circumstances justified the wife in inferring an intention to desert, and that, though the court must take the standard of what a reasonable man would have been held to have intended, the presumption may be rebutted. In *Graves* v. *Graves*[10] there was the clearest possible evidence of actual intention and it is not clear why this case was treated as one of constructive desertion. In *Pizzala* v. *Pizzala*,[11] which was an undefended suit, it is clear that the President was not prepared to hold that he must assume intention; he merely drew an inference of intention. The husband's communication to the wife was the crucial matter. *Koch* v. *Koch*,[12] it is submitted, was wrongly decided on the facts, while *Synge* v. *Synge*[13] clearly shows that adultery per se does not amount to constructive desertion. In *Pulford* v. *Pulford*[14] desertion was found as a fact; an objective test was not propounded. In *Thomas* v. *Thomas*[15] the husband acted with determination and deliberation. *Bowron* v. *Bowron*[16] is authority for the proposition that an express intention is necessary; it was not merely a decision on the facts, but was a statement of the court's views on desertion. Then came *Boyd* v. *Boyd*,[17] in which the lack of the element of intention clearly resulted in the decision that there was no desertion. *Buchler* v. *Buchler*[18] was an important case. The judgment of the Master of the Rolls in that case does not mean that a man cannot give evidence of his real intention. If the judgment is read as a whole it means that intention must be found either actual or by inference and that there is no such thing as an objective test as to intention. In *Edwards* v. *Edwards* [19] the President disapproved of *Boyd* v. *Boyd*.[20] It is submitted that he went very far in saying that it was not necessary to find intention.

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[5] 86 C.L.R. 424.
[6] (1896) 12 T.L.R. 451.
[7] (1912) 15 C.L.R. 538.
[8] [1899] P. 278; 15 T.L.R. 506.
[9] Ibid.
[10] (1864) 3 Sw. & Tr. 350.
[11] 12 T.L.R. 451.
[12] [1899] P. 221.
[13] [1900] P. 180; 16 T.L.R. 388.
[14] [1923] P. 18; 39 T.L.R. 35.
[15] [1924] P. 194; 40 T.L.R. 250.
[16] [1925] P. 187; 41 T.L.R. 245.
[17] [1938] 4 All E.R. 181; 55 T.L.R. 3.
[18] [1947] P. 25; [1947] 1 All E.R. 319; 63 T.L.R. 100.

Winnan v. *Winnan* [21]—the enormous number of cats case—can only be supported on the ground that the cats were intolerable and that the wife preferred them to the husband's presence. There must be one intention which is stronger than the other, and there she opted for the cats and dismissed the husband. The keeping of the cats was misconduct of a grave and convincing character; it was an indication to him to go. Chronologically, *Squire* v. *Squire* [22] and *Everitt* v. *Everitt* [23] follow, but they do not assist very much. *Westall* v. *Westall* [24] was a cruelty case and therefore not directly in point, but Denning L.J. dealt with the principle that a man is taken to intend the natural consequences of his acts. What was said in *Rex* v. *Steane* [25] applies with equal force here—there never was an intention to drive the wife out or to desert her in that sense. If desertion were made a crime it would be essential to include in the indictment the words "with intent." [Reference was also made to *Hosegood* v. *Hosegood*.[26]] There are some observations of Bucknill L.J. in *Edwards* v. *Edwards* [27] which might be read as meaning that "probability" was the test. It is submitted that they should not be so read; in any event in so far as there were such observations they were obiter. *Lawrence* v. *Lawrence* [28] is only relevant here because it does express the view that "just cause" equals desertion by the other party. On "just cause" see also *Rice* v. *Raynold-Spring-Rice*.[29] The only materiality of *Simpson* v. *Simpson* [30] is that the President took the opportunity of expressing his counter-views to those of Denning L.J. *Bartholomew* v.

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[19] [1948] P. 268; [1948] 1 All E.R. 157; 64 T.L.R. 61.

[20] [1938] 4 All E.R. 181; 55 T.L.R. 3.

[21] [1949] P. 174; 65 T.L.R. 22; [1948] 2 All E.R. 862.

[22] [1949] P. 51, 57; 64 T.L.R. 371; [1948] 2 All E.R. 51.

[23] [1949] P. 374, 385; [1949] 1 All E.R. 908.

[24] (1949) 65 T.L.R. 337.

[25] [1947] K.B. 997; 63 T.L.R. 403; [1947] 1 All E.R. 813.

[26] (1950) 66 T.L.R. (Pt. 1) 735.

[27] [1950] P. 8; 65 T.L.R. 419; [1949] 2 All E.R. 145.

[28] [1950] P. 84; 66 T.L.R. (Pt. 1) 9.

[29] [1948] 1 All E.R. 188; 64 T.L.R. 119.

[30] [1951] P. 320, 330; [1951] 1 T.L.R. 1019; [1951] 1 All E.R. 955.

Bartholomew[31] supports the appellant's general proposition. *Pike* v. *Pike*[32] decided that in order to make the husband guilty of constructive desertion there must be an intention to bring the matrimonial relationship to an end. That case turned largely on its facts, but it does express a most important point of principle; it is relied on for the observations of Denning L.J., where he again underlines the absolute necessity of finding intention.

If one has to infer intention, then there must be grave and weighty matters before one can start to infer. Pinpricks alone, with no other evidence, would not, in the absence of any other intention, justify an inference of intention. Mere "intolerability" can never be the test. It is conceded that, if the conduct is directly intended to drive the wife out, the essential elements are there, and if the conduct is persisted in with that object then it can be a case of desertion. "Constructive" only legitimately comes in when it is a question of constructive intention, and the appellant seeks in this case to destroy the implication of a constructive intention.

In *Bain* v. *Bain*[33] the sexual conduct of the husband was particularly relied upon. It is submitted that a husband's desire to possess his wife in a particularly revolting fashion does not amount to desertion so long as he does not desire to dispossess her, and that *Bain* v. *Bain*[33] is authority for this proposition. The subtle distinction between "desire" and "intention" is extremely difficult. The essence of desertion is the forsaking and abandoning, and if any element is important it is the intention. This is expressed by the use of the word "wilful" in the Marriage Act, 1928. It is submitted that those of the cases of constructive desertion which were founded on adultery were wrongly decided where there was no evidence of intention. For example, where a husband is committing adultery with one of the serving maids of the matrimonial home and the wife indicates that she will leave, and does so, the circumstances fall a hair's breadth short of what will justify a charge of constructive desertion. The petitioner in *Bain* v. *Bain*[33] was unable to succeed because the court would not permit the respondent's intention to be assumed and because it found that he did not contemplate that his conduct would drive the petitioner out. Lack of intention to retain is not equivalent to an intention to drive out. In *Baily* v. *Baily*[34] there was no actual intention to desert and no intention to persist. The formula laid down in *Bain* v. *Bain*[35] and so often repeated in *Baily* v. *Baily*[36] was not sought to be applied therein. In any event, the application of the rule laid down in *Bain* v. *Bain*[35] does not come anywhere near to satisfying the proper test for desertion; it merely amounts to the prediction of a reasonable man whether the marriage concerned will break up or not. The second limb of the decision in *Bain* v. *Bain*,[35] approved in *Baily* v. *Baily*,[36] was wrong. Where conduct is intolerable or inconsistent with the continuance of a marriage there cannot, merely from that, be imputed an intention to desert. It is not sought to deny that such an intention may be imputed from a course of conduct, but not where the respondent has striven to the limit of his abilities to retain the marriage. Conduct inconsistent with consortium cannot be an objective conception; it must depend on the attitude and sensibilities of the parties in each case. The fact that a wife withdraws from the marriage cannot be a fact from which the husband's intention before the withdrawal can be deduced. Two Australian decisions which have been given since *Lang* v. *Lang*[37] are *Deery* v. *Deery*[38] and *Sharah* v. *Sharah*.[39] It is submitted that the judgment in *Deery* v. *Deery*[38] amounts to a condemnation of the judgment in *Lang* v. *Lang*.[40] The law of constructive intention finds no place in the later case; there must be real intention. Although the court purported to rely on *Baily* v. *Baily*,[41] it did not do so, and the gist of the decision is that although there were warnings delivered to the respondent, and although there was conduct which a reasonable person would have foreseen would bring the marriage to an end, there was no desertion because there was no intention or desire to end the marriage.

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[31] [1952] 2 All E.R. 1035; [1952] 2 T.L.R. 934.

[32] [1954] P. 81n.; [1953] 1 All E.R. 232.

[33] 33 C.L.R. 317.

[34] 86 C.L.R. 424.

J. E. S. Simon Q.C. and *John Latey* for the respondent. In desertion a constructive factum is possible, and the question posed in the present case is: Why should there not be a constructive intention? There are five aspects inherent in desertion: (1) The act must be intentional. The statute relevant to the present case speaks of "wilful," but quite apart from this intention is essential. (2) There must be misconduct. (3) The misconduct must be matrimonial misconduct and must amount to more than the mere wear and tear of married life: *Buchler* v. *Buchler*[42];

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[35] 33 C.L.R. 317.
[36] 86 C.L.R. 424.
[37] 86 C.L.R. 432.
[38] (1954) Argus L.R. 262.
[39] Unreported.
[40] 86 C.L.R. 432.
[41] 86 C.L.R. 424.
[42] [1947] P. 25.

and in *Simpson* v. *Simpson*[43] Lord Merriman P. laid emphasis on the necessity of "ill-treatment." It is submitted that this qualification eliminates from the categories of acts from which intention may be presumed acts of misconduct which are not matrimonial and those which though matrimonial are of a trivial nature. (4) The misconduct must be of a grave and convincing character: *Buchler* v. *Buchler*.[44] Consent is fatal to desertion; therefore in constructive desertion the conduct must be such as reasonably to overbear the wish of the party who desires to remain. If the conduct leaves room for the wilfulness of the leaving party there is an element of consent. The conduct must reasonably cause the separation; it must in fact drive out. The separation must be of a permanent character subject to determination by proper amends. In certain of the Australian cases the court considered that there was conduct sufficient to drive the wife away but not permanently. (5) This expulsive conduct must be without cause; in other words, it must be unprovoked.

In considering from what matrimonial misconduct it is possible to infer an intention to drive a wife out various tests have been put forward. (1) The subjective test; and intention consists only of intentional matrimonial misconduct reasonably compelling a particular wife to withdraw, the husband desiring that she should do so. This test puts the obtuse or the sadistic husband at an advantage. This would be a most undesirable doctrine, and there is clear Australian and English authority for saying that where a man wants, for instance, to retain his wife and a mistress at the same time, that is desertion. It is submitted that intent involves an element of force. *Best* v. *Samuel Fox & Co. Ld.*[45] established that the law will not split up consortium.

(2) As it was put in *Bain* v. *Bain*,[46] the test may be intentional matrimonial misconduct which the husband knew would reasonably cause the wife to withdraw permanently from cohabitation and which did in fact cause her to do so, even though the husband desired her not to. There may, in other words, be dominant and subservient desires, and persistence in a certain course of conduct is relevant in deducing the dominant desire: *Crofter Hand Woven Harris Tweed Co.* v. *Veitch*.[47] There may be a real intention though the desire to bring cohabitation to an end is merely constructive. For these propositions the adultery cases, *Koch* v.

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[43] [1951] P. 320.

[44] [1947] P. 25.

[45] [1952] A.C. 716; [1952] 2 All E.R. 394.

[46] 33 C.L.R. 317.

[47] [1942] A.C. 435; 58 T.L.R. 125; [1942] 1 All E.R. 142.

Koch,[48] *Farmer* v. *Farmer*,[49] *Garcia* v. *Garcia*,[50] and the case of *Hosegood* v. *Hosegood*[51] and the Australian case of *Donnelly* v. *Donnelly*[52] are authority. The law would make itself ridiculous if it allowed itself to be concluded by a profession of intention.

(3) The intentional matrimonial misconduct as to which the husband was reckless of whether it would cause the wife to withdraw permanently and which reasonably caused her to do so. Here the intention is submitted to be analogous to the forms of gross negligence in tortious and criminal matters.

(4) Intentional matrimonial misconduct which the husband would reasonably know would or might reasonably cause the wife to leave. This provides a more objective test of knowledge and allows of a constructive knowledge; in other words, the court may ask itself: what knowledge would a reasonable man take in these circumstances?

(5) Intentional matrimonial misconduct which reasonably caused this particular wife to withdraw permanently from cohabitation. The test is the purely objective one of intolerability laid down in *Moss* v. *Moss*.[53]

Whether categories 4 and 5 (supra) are part of the law of this country or not, they are certainly part of the law of Australia as enunciated in decisions decided before the re-enactment of the statute of 1928. It is a rule applicable to the interpretation of statutes, and particularly to codifying statutes, that words are re-enacted bearing the interpretation put upon them in judicial decisions. Reliance is placed on Halsbury, vol. 31, para. 624; Maxwell, 10th ed., 313; Craies, 5th ed., 158, and the decisions in *In re Cathcart*,[54] *Mitchell* v. *Simpson*[55] and *Barras* v. *Aberdeen Steam Trawling and Fishing Co. Ld.*[56] A slightly different view was enunciated in *Robinson Bros., Brewers Ld.* v. *County of Durham Assessment Committee*,[57] but it is submitted that the present case is covered by the *Barras* case[58] and not by *Robinson's* case.[59] As to *Royal Crown Derby Porcelain Co.* v. *Raymond Russell*,[60] it is submitted that the statements of Denning L.J. were too wide and that the headnote is misleading since everything contained therein is obiter.

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[48] [1899] P. 221.

[49] (1884) 9 P.D. 245.

[50] (1888) 13 P.D. 216; 4 T.L.R. 702.

[51] 66 T.L.R. (Pt. 1) 735.

[52] (1939) 61 C.L.R. 577.

[53] (1912) 15 C.L.R. 538.

[54] (1870) L.R. 5 Ch. 703, 706.

[55] (1890) 5 Q.B.D. 183.

[56] [1933] A.C. 402; 49 T.L.R. 391.

[57] [1938] A.C. 321, 339; 54 T.L.R. 568; [1938] 2 All E.R. 79.

[58] [1933] A.C. 402.

[59] [1938] A.C. 321.

[60] [1949] 2 K.B. 417; [1949] 1 All E.R. 749.

In *Marshall or Wilkinson* v. *Marshall*[61] the word "desertion" as re-enacted by the Act of 1938 was held to retain its former meaning encrusted with former decisions. The Act in question was not a consolidating Act; the decision is, therefore, more strongly in the respondent's favour. The case law in Australia shows that the word "desertion" includes constructive desertion of the particular nature alleged in the present case.

Before passing to a survey of the Australian cases, it is submitted that the necessary elements in intention are foreknowledge and volition. Desire is not such an element, though mistakenly thought to be so, because it is in general the mainspring of volition and also an element in motive. In criminal law mens rea is foreknowledge of a possibility, or in negligence foreknowledge of a probability. If the natural and probable consequences are adverted to, there is mens rea, and this is not to be rebutted by saying "I did not intend." In criminal law one has as a parallel to the doctrine of constructive desertion the doctrine of constructive malice; in other words, a man cannot be heard to say "I "did not mean what I knew would happen." *Rex* v. *Steane*[62] did not derogate from that; all that Lord Goddard C.J. said was that the accused had shown conduct consistent with innocent intention.

Of the Australian cases, those will first be considered which were decided after the Marriage Act, 1890. The first was *Hutchinson* v. *Hutchinson*,[63] an undefended case, in which the purely objective test for constructive desertion was laid down, though obiter, that there must be conduct such as a reasonable person would consider would drive the wife out. There followed *White* v. *White*,[64] which would appear to be against the present respondent, in which it was held that factum was not enough without intention, that intention was a question of fact, and that there was no evidence of actual intention. Nevertheless, in *Moss* v. *Moss*[65] exactly the same court as decided *White's* case[66] held that intention to drive a wife away might be imputed to the husband. The intent which was found in that case was a purely constructive one, and it is unnecessary for me to say whether or not *Sickert* v. *Sickert*[67] was correctly interpreted, for the interpretation put upon it thus became part of the law of Australia. The test laid down was that of intolerability, and the judgment of Isaacs J. does not refer to intention throughout. As to a request to stay in the matrimonial home under conditions that are intolerable, reference may also be made to the English decision of *Thomas* v. *Thomas*,[68] which decided that a husband's genuine efforts at reconciliation after a separation brought about by his conduct, as to which amends could not be made, will not avail him. The test of the reasonable man was applied. In *Hallihan* v. *Hallihan* [69] the court held that a wife had well-founded reasons for refusing to accept her husband's bona fide offer and applied the purely objective test. This case goes close to saying that just cause is equivalent to desertion, but such an assertion is not necessary to the present contention.

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[61] [1943] 2 All E.R. 175, 178.

[62] [1947] K.B. 997.

[63] [1908] V.L.R. 411.

[64] (1908) 7 C.L.R. 477.

[65] 15 C.L.R. 538.

[66] 7 C.L.R. 477.

[67] [1899] P. 278.

After the Marriage Act, 1915, came *Dearman* v. *Dearman*,[70] in which it was pointed out that good cause and constructive desertion were different conceptions, but that intention to persist in grave and weighty conduct that amounted to just cause might convert just cause into constructive desertion. Good cause does not necessarily involve matrimonial misconduct. It need not be of a nature such as to bring about a permanent separation, and it need not be directed against the other spouse. *Kollner* v. *Kollner* [71] followed, and then *Bain* v. *Bain*.[72] In the latter case the objective test of intention is referred to by the Chief Justice [73]: the older criterion of actual intention is rejected and constructive intention is contrasted with actual intention. The gist of the decision is that there need not be a refusal to cohabit so long as there is a failure or disruption of cohabitation. The analysis by Isaacs and Rich JJ. that if a man knows or ought reasonably to know that his conduct will drive his wife to leave him he is guilty of constructive desertion, is a valuable and valid one.

In England the presumption is clearly rebuttable by saying either "I was incapable of forming the intent" or "I did not "foresee the result," that is to say, for reasons, e.g., of illness, duress, drunkenness. The presumption cannot be destroyed merely by saying that one did not have the desire. It is submitted that according to Australian law the presumption is irrebuttable. According to English law there is no irrebuttable presumption and the onus is on the petitioner to prove his case. In the present case it is not necessary to seek to rely on an irrebuttable presumption because the husband knew the effect of his conduct or was reckless as to it or ought reasonably to have known the effect of it.

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[68] [1924] P. 194.
[69] [1913] V.L.R. 443.
[70] (1916) 21 C.L.R. 264.
[71] [1918] V.L.R. 500.
[72] [1923] V.L.R. 421; 33 C.L.R. 317.
[73] [1923] V.L.R. 425.

The headnote of the report of *Bain* v. *Bain* [74] in the High Court in the Victoria Law Reports correctly sets out the effect of the irrebuttable presumption laid down in *Moss* v. *Moss* [75] and imputed from knowledge and conduct. As to the objective test of intention, see the words of Blackburn J. in *Smith* v. *Hughes*.[76] The test laid down in *Baily* v. *Baily* [77] is abundantly justified by the authorities.

There are four degrees of knowledge: (a) actual knowledge; (b) recklessness; (c) connivance; (d) such knowledge as a reasonable man might have; and it is to the last that the judges referred in *Bain* v. *Bain*.[78] There cannot be intention without foreknowledge. It is unnecessary for the respondent to show that the knowledge of the reasonable man is the test for the purposes of this case. If he knows that it is a reasonably probable result, that is the test which the law applies in all these cases; and if he knows that it is a reasonable probability, then he intends it although he prefers that it should not come about. It is sufficient in the present case to show that he was reckless as to the consequences; he had an attitude of mental indifference to obvious risks: *Hudston* v. *Viney*.[79] *Moss* v. *Moss* [80] shows that it is not necessary to prove actual intention to bring the marriage to an end; that it is sufficient to show conduct from which a desire can be imputed. *Donnelly* v. *Donnelly* [81] is an important decision, because there was a desire to remain in cohabitation plus a desire to persist in intolerable conduct. It is again important as showing that the test is whether the conduct is sufficient to overbear the will to adhere. It shows that in Australia it was not necessary to show a specific desire to disrupt the matrimonial cohabitation. There can be no distinction between a wife being placed in an intolerable position owing to a mistress being imported and her position where there is physical ill-treatment. [Reference was also made to *Parsonage* v. *Parsonage*,[82] *Taylor* v. *Taylor*,[83] *Baker* v. *Baker* [84] and *Batten* v. *Batten*.[85]] The last-cited case is important for the emphasis that was laid on the relevance of

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[74] 33 C.L.R. 317; [1923] V.L.R. 421.

[75] 15 C.L.R. 538.

[76] (1871) L.R. 6 Q.B. 597, 599, 607.

[77] 86 C.L.R. 424.

[78] 33 C.L.R. 317.

[79] [1921] 1 Ch. 98, 104.

[80] 15 C.L.R. 538.

[81] 61 C.L.R. 577.

[82] [1946] V.L.R. 408.

[83] [1950] V.L.R. 156, 158.

[84] [1953] V.L.R. 124, 127.

[85] [1952] V.L.R. 209, 211.

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warnings. There are decisions in the Supreme Courts of the other States which followed *Bain* v. *Bain*[86] and *Moss* v. *Moss*.[87] *Meech* v. *Meech*[88] is very close to the present case; if the contention for the appellant here is right, that case was wrongly decided. It was followed in *A.* v. *A.*,[89] where again there was a desire of the husband to continue living with his wife, and it was held that that was not fatal to a charge of constructive desertion—that case also must be incorrectly decided if the appellant's contention is right.

Turning to the English cases, there are many dicta in the cases which go so far as to show that the rule in this branch of jurisprudence that a man must be taken to intend the natural, probable and necessary consequences of his action is an irrebuttable presumption. The law will not allow a man to assert his own unreasonableness to defeat prima facie rights in the other party. Two cases of real significance, where there was the desire to preserve the matrimonial cohabitation but also to enjoy the society of a mistress, which was considered in those circumstances as intolerable conduct, are *Farmer* v. *Farmer*[90] and *Garcia* v. *Garcia*.[91] *Koch* v. *Koch*[92] also falls within the class of case where the husband was guilty of intentional matrimonial misconduct which he either knew or ought to have known would reasonably cause his wife to withdraw from permanent cohabitation even though he desired her not to. *Teall* v. *Teall*[93] is distinguishable from cases like *Farmer* v. *Farmer*[94] and *Garcia* v. *Garcia*[95]—it decided that a single isolated act of adultery, outside the six months' period, does not of itself amount to constructive desertion. *Sickert* v. *Sickert*[96] really shows the test of the self-respecting wife. In *Synge* v. *Synge*[97] the Court of Appeal left open the question whether the wife was guilty of constructive desertion.

The question here is, is a willingness to resume cohabitation on unreasonable conditions an answer to a charge of desertion? As a general proposition it is submitted that the willingness of the party charged with desertion to live with the other is irrelevant at any stage if it is only a willingness to live under unreasonable conditions. *Eastbourne Guardians* v. *Croydon Guardians* [98] is not as strong in the respondent's favour as some of the cases. The authority of the decision in *Thomas* v. *Thomas* [99] appears never to have been questioned; there again, the test is applied of reasonable grounds for refusal to cohabit, and also that there is no distinction to be drawn between the adultery and the ill-treatment cases. *Thomas* v. *Thomas* [99] is a highly important decision, for it establishes that an animus deserendi may subsist at the time of the alleged inception of desertion and during the relevant period notwithstanding the desire on the part of the spouse charged with desertion to cohabit with the other spouse. *Thomas* v. *Thomas* [99] is incompatible with the case of the appellant here. Desire to return to cohabitation cannot be a necessary element in the animus. *Bowron* v. *Bowron* [100] shows that the intention is the same at the inception of the desertion and throughout the relevant period. *Boyd* v. *Boyd* [101] in point of fact is irrelevant to the main point of controversy here, because it is supportable on the ground that the factum of conduct was insufficient because it was not matrimonial misconduct. The submission is that a wish to live with the wife is not fatal to a charge of constructive desertion. *Spence* v. *Spence*,[102] for what it is worth, is putting the presumption as if it were irrebuttable. *Leng* v. *Leng* [103] is a correct decision because of the factum, but it is immaterial because it is not sought here to argue that factum and animus should be equated.

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[86] 33 C.L.R. 317.
[87] 15 C.L.R. 538.
[88] (1919) 38 N.Z.L.R. 553.
[89] (1930) 49 N.Z.L.R. 510.
[90] 9 P.D. 245.
[91] 13 P.D. 216, 219; 4 T.L.R. 702.
[92] [1899] P. 221.
[93] [1938] P. 250; 54 T.L.R. 960; [1938] 3 All E.R. 349.
[94] 9 P.D. 245.
[95] 13 P.D. 216.
[96] [1899] P. 278.
[97] [1900] P. 180; 16 T.L.R. 388; [1901] P. 317, 322.

Buchler v. *Buchler*,[104] a most important case, was not a decision on intention at all, but on the factum of conduct—whether it was equivalent to driving the other spouse away. It is conceded that there are passages in it to the effect that an affirmative intention must be proved in order to satisfy the test of constructive desertion, the intention actually to disrupt the matrimonial cohabitation, but that was not the issue to which the court was addressing its mind; it was factum. *Holborn* v. *Holborn* [105] deals with the element of knowledge, and with the element of persistence in spite of that knowledge. [Reference was also made to *Edwards* v. *Edwards*[106] and *Squire* v. *Squire*.[107]] In *Winnan* v. *Winnan*[108]—the cats case—there was a wish to continue in cohabitation under conditions which were unreasonable, intolerable to the other side. A willingness to remain in cohabitation is irrelevant if conditions are intolerable. *Hosegood* v. *Hosegood*[109] supports the respondent's case here; it is another case of the wish to adhere not being a fatal element in constructive desertion. [Reference was also made to *Lawrence* v. *Lawrence*[110] and *Bartholomew* v. *Bartholomew*.[111]] No great reliance can be placed on *Pike* v. *Pike*[112] because the question of intention did not arise at all; their minds were directed to the factum of separation.

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[98] [1910] 2 K.B. 16; 26 T.L.R. 447.

[99] (1923) 129 L.T. 575; (C.A.) [1924] P. 194, 198.

[100] [1925] P. 187, 195; 41 T.L.R. 245.

[101] [1938] 4 All E.R. 181.

[102] [1939] 1 All E.R. 52, 57; 55 T.L.R. 316.

[103] [1946] 2 All E.R. 590; 62 T.L.R. 722.

[104] [1947] P. 25.

[105] [1947] 1 All E.R. 32; 63 T.L.R. 87.

Summarizing the effect of the English cases on constructive desertion: they show that it is not necessary in order to prove constructive desertion to negative the existence in the mind of the party charged of a desire to disrupt the matrimonial cohabitation; or, put the other way, proof of a desire to remain in cohabitation or to return to cohabitation does not of itself prevent the inception or the running of desertion. It follows from that that if the animus does not include an actual desire to disrupt the matrimonial cohabitation, the very least that it can be is an intention to carry on a course of conduct which the husband knows will drive the wife away; and the cases in fact clearly establish that recklessness is sufficient: *Winnan* v. *Winnan*[113]; *Hosegood* v. *Hosegood*.[114] *Mordaunt* v. *Moncreiffe*[115] shows that it is unsafe in some respects to apply principles of criminal law in divorce jurisprudence. The standard of proof in a divorce case is the same as in a criminal case. *Rex* v. *Steane*[116] is clearly distinguishable; it is no authority or assistance in this case; in fact it begs the question that arises here—what is the nature of intention in a case of constructive desertion. [Reference was also made to *Sinnasamy Selvanayagam* v. *The King*.[117]]

Applying the law to the facts of this case, it is submitted that both in England and in Australia, on authority and on principle, it is unnecessary to prove in constructive desertion that there was a positive desire that the matrimonial consortium should be

[106] [1948] P. 268, 271; 64 T.L.R. 61; [1948] 1 All E.R. 157.
[107] [1949] P. 51, 57.
[108] [1949] P. 174.
[109] 66 T.L.R. (Pt. 1) 735.
[110] [1950] P. 84.
[111] [1952] 2 All E.R. 1035.
[112] [1954] P. 81n.
[113] [1949] P. 174.
[114] 66 T.L.R. (Pt. 1) 735.
[115] (1874) L.R. 2 Sc. & D. 374, 393.
[116] [1947] K.B. 997.
[117] [1951] A.C. 83.

disrupted, and that at the very lowest it is sufficient to prove that the husband was guilty of intentional conduct which he knew would drive his wife out, or as to which he was reckless whether it would drive her out or not, or was guilty of self-blindness. At any rate in Australia the test is a higher and more objective one. But it is sufficient for the respondent to satisfy the Board that this husband knew that the wife was leaving or was reckless as to whether she went or not, and shut his eyes to the probability of her going. What the courts below found as to knowledge was fully justified.

James Stirling in reply. The authorities in Australia before 1915 show that actual intention was required. Actual intention means real intention. It is very difficult to isolate any particular clear certain principles running through later Australian cases. The position is reasonably clear on the English authorities. The general submission for the appellant here is clearly set out in *Bartholomew* v. *Bartholomew* [118]—that actual intention as it is ordinarily understood is what must be proved. Intention must be proved and cannot be imputed.

November 10. The judgment of their Lordships was delivered by LORD PORTER. The matrimonial law of the State of Victoria differs notably from that of England. The main differences are: (1) that cruelty without more has in Australia never been a ground for divorce a vinculo as it has been in England since 1937, but only for a judicial separation; (2) that desertion which, without more, became a ground of divorce in England in 1937, has been such a ground a vinculo in Victoria as long ago as 1890 by provisions which, so far as relevant to this case, were re-enacted without alteration by statutes of 1915 and 1928.

The following are the provisions of the Marriage Act, 1928 (No. 3726) of the State of Victoria which govern the relevant transactions: " (75) Any married person who at the time of the " institution of the suit has been domiciled in Victoria for two " years and upwards, may present a petition to the court praying " on one or more of the grounds in this section mentioned that " his or her marriage with the respondent may be dissolved— " (*a*) on the ground that the respondent has without just cause or " excuse wilfully deserted the petitioner and without any such " cause or excuse left him or her continuously so deserted during " three years and upwards; (*b*) on the ground that the respondent

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[118] [1952] 2 All E.R. 1035.

" has during three years and upwards been an habitual drunkard, " and either habitually left his wife without means of support, or " habitually been guilty of cruelty towards her . . . (*d*) on the " ground that within one year previously the respondent . . . has " repeatedly . . . assaulted and cruelly beaten the petitioner; . . . " If in the opinion of the court the petitioner's own habits or " conduct induced or contributed to the wrong complained of . . . " such petition may be dismissed."

By section 77 of the same Act, a wife may present a petition for dissolution of marriage, inter alia, on the grounds of adultery coupled with cruelty, and under sections 63 and 64, a decree of judicial separation may be granted, inter alia, on the ground of cruelty. Unless, however, the cruelty can be brought within the terms of sections 75 (*b*) or (*d*) or 77 (set out above), it is not a ground for dissolution of marriage under Victorian law.

If cruelty had been a sufficient ground for divorce in the State of Victoria, then assuming, as seems to their Lordships very probable, that the wife's health suffered from the treatment she received, the case would have presented no complications. As it is, the wife, who had been brutally ill-used and insulted over a long period, since she was the first to leave the matrimonial home had to found her petition on desertion; and in order to succeed had to establish what is described as " constructive desertion."

At this point, and before proceeding with any summary of the facts, their Lordships think it desirable to make certain general observations about the law (*a*) of desertion; (*b*) of so-called " constructive desertion." Both in England and in Australia, to establish desertion two things must be proved: first, certain outward and visible conduct—the " factum " of desertion; secondly, the " animus deserendi "—the intention underlying this conduct to bring the matrimonial union to an end.

In ordinary desertion the factum is simple: it is the act of the absconding party in leaving the matrimonial home. The contest in such a case will be almost entirely as to the " animus." Was the intention of the party leaving the home to break it up for good, or something short of, or different from that?

Since 1860 in England, and for a long time in Australia, it has been recognized that the party truly guilty of disrupting the home is not necessarily or in all cases the party who first leaves it. The party who stays behind (their Lordships will assume this to be the husband) may be by reason of conduct on his part making it unbearable for a wife with reasonable self-respect, or powers of endurance, to stay with him, so that he is the party really responsible for the breakdown of the marriage. He has deserted her by expelling her: by driving her out. In such a case the factum is the course of conduct pursued by the husband—something which may be far more complicated than the mere act of leaving the matrimonial home. It is not every course of conduct by the husband causing the wife to leave which is a sufficient factum. A husband's irritating habits may so get on the wife's nerves that she leaves as a direct consequence of them, but she would not be justified in doing so. Such irritating idiosyncrasies are part of the lottery in which every spouse engages on marrying, and taking the partner of the marriage "for better, for worse." The course of conduct—the "factum"—must be grave and convincing.

In the present case there is not the slightest question that the "factum" is sufficient. The facts are not in dispute. There are in effect concurrent findings that the husband grossly ill-used and insulted his wife over a period of five years and gave her ample justification for leaving him.

The whole and sole question is whether the wife has proved the necessary animus or intent on the part of the husband. How should that animus be ascertained? In particular, (1) is it enough for her to show a course of conduct on the part of the husband which in the eyes of a reasonable man would, by making her life insufferable, be calculated to drive the wife out, the husband's actual intention being immaterial on the footing that every man is presumed to intend the natural and probable consequences of his acts? Or (2) should the objective criterion of the reasonable man's reactions be rejected on the footing that the real question is, did this particular husband (who may not have been reasonable) know that his conduct, if persisted in, would in all human probability result in the wife's departure—it being remembered that it is possible (human nature being what it is) for such knowledge on the husband's part to co-exist with a desire that she should stay, since people often desire a thing but deliberately act in a way which makes that desire unrealizable. Or again (3), should inferences which would naturally be drawn be wholly disregarded and an intention which would naturally be drawn from the husband's conduct negatived provided there is proved to exist, de facto, on his part a genuine desire (however illogical or impossible it may be to square such a desire with his conduct) that the matrimonial union should continue? On this view the husband's desire to maintain the home is conclusive whatever his conduct. All three of these views have found expression in the decided cases.

Their Lordships have thought it convenient to state in very general outline the legal issues involved before citing any authorities or concluding their summary of the facts. To this last task they now revert. The material facts are conveniently summarized in the judgment of the Supreme Court of Victoria by Lowe J.: "But I take up the story in some detail from the respondent's "return from the Middle East in 1942. He had been on active "service, and that was the time of his return. In a conversation "with his son—and the substance of it was repeated to others— "he said that thenceforward he was going to be master; and "when the son asked him whether that meant that he was going "to knock his mother about he said that was the only thing she "understood. From this time on, I find a series of constant "disturbances and acts of violence on his part. There were "slaps and punches which he administered to the petitioner on "the face and the body. He struck her on occasions with a "ruler and with a cane and with a slipper and did this in the "undignified way, on occasion, of placing her across his knee and "administering punishment in that way. There were bruises put "upon her body by these means and the bruises on occasions "were seen by other people. He twisted her arms behind her "back and so caused her pain, and on occasion he so held the "twisted arms in a position that continued for nearly an hour, "and when the police arrived, on the summons of one of the "children, he was still holding his wife's arms in that position. "On two occasions at least he dragged her by the hair into the "bathroom and held her under the cold shower. He abused her "and he constantly called her a bitch, and there were nightly "disturbances created by him, destroying his wife's rest. Now "that is a series of incidents and a course of conduct which "persisted over several years. She told him on a number of "occasions that if he continued that conduct she would have to "leave as that conduct was affecting her health. And on one "occasion she did leave, and left for some little time. I shall "deal with that more particularly, but on another occasion she "left and walked the street for the night so that she might not "stop in the house."

She separated from him on two occasions, viz., in 1943 and in July, 1948, before they finally parted. On the first occasion she remained away for about two months and was induced to return by promises of amendment, which were however promptly and continuously thereafter violated. On some date in July, 1948, he treated her with such violence that, not for the first time, the police had to be invoked. She then asked him to leave, and he did: returning however on August 11. On August 13 occurred the culminating incident which caused her finally to leave him. The husband professed to have taken advice from a psychiatric friend as to how he could improve his relations with his wife, and to have been advised to try " Caveman stuff."

It is a little surprising that this suggestion was treated by the husband as a new departure: " Caveman stuff " is not an unfair description for the treatment he had been applying to his wife for years past and which had twice caused her to leave him. However, on August 13, he planned and carried out what he referred to as the " rape of Lucrece "; in the words of the trial judge's finding he " forced sexual intercourse on her in circumstances of " calculated and revolting indignity ": and told her that he was going to " use her for the same purpose whenever he wanted to " and as often as he wanted to." These last words are important. She then finally left and filed her petition, ignoring a number of letters which he wrote begging her to return but not expressing any intention to treat her differently if she did. Her patience was not unnaturally exhausted, and even if he had expressed penitential sentiments it would not have been unreasonable for the wife to doubt their sincerity.

The Australian law as to constructive desertion is principally contained in three or four decisions of the High Court. Before considering these their Lordships would make some general observations.

In the present case the existence of conduct by the husband being of sufficient gravity to constitute the necessary factum, the question is what he intended, or must be taken to have intended, while so conducting himself. Did he intend to bring the matrimonial relations to an end? Let it be supposed that a husband intentionally persists in conduct which the hypothetical reasonable man would think calculated to cause the wife to leave him; is he necessarily guilty of constructive desertion, notwithstanding that he genuinely desires the marriage to survive? If so, evidence of his consistently expressed desire that the wife should stay with him is irrelevant and inadmissible. The formula, if satisfied, creates an irrebuttable presumption.

In other words, if a man deliberately makes his wife's life unbearable according to an objective standard, i.e., the reasonable man's reactions, is he conclusively presumed to intend to drive her out—the presumption that a man intends the natural and probable consequences of his acts being treated as irrebuttable? This view has been in the ascendant in the leading decisions of the High Court of Australia, though of late traces of a recession from it have been discernible. In England this view finds expression in *Sickert* v. *Sickert*,[1] *Edwards* v. *Edwards*,[2] and generally in the cases where a husband has installed in the matrimonial home, or refused to expel from it, or to dismiss from his service a mistress—examples of which may be found in *Dickinson* v. *Dickinson*[3] and *Koch* v. *Koch*.[4]

The other view, which is embodied in the English decision in *Boyd* v. *Boyd*,[5] and in certain observations in *Bartholomew* v. *Bartholomew*,[6] is that no matter how reprehensible has been the husband's behaviour, if there is positive and credible evidence negativing any actual intention on his part to end the marriage, the law will not impute such an intention to him.

In Australia, on the other hand, in *Moss* v. *Moss*,[7] on appeal from New South Wales, what has been referred to as the objective test of conduct amounting to constructive desertion was laid down in terms so designed as to make the deserter's actual intentions immaterial if the objective test were justified. If the course of conduct is sufficiently blameworthy and prolonged, the case decides that the law will impute to the guilty party an intention to bring the matrimonial union to an end, whatever his actual or professed desire. Overtures for a reconciliation, for instance, or a genuine de facto wish that the wife should stay, will in such a case be overriden by this imputation. The gist of the case of *Baily* v. *Baily*,[8] decided 40 years later, is to affirm what has been called the objective test except where there has been express desertion, and is accurately summarized in the judgment of the trial judge, Lowe J., in the following passage: "This is a wife's "petition to dissolve the marriage on the ground of her husband's "desertion. In fact it was she who left the matrimonial home "and therefore the case is one of what has come to be known

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[1] [1899] P. 278; 15 T.L.R. 506.

[2] [1948] P. 268; 64 T.L.R. 61; [1948] 1 All E.R. 157.

[3] (1889) 62 L.T. 330.

[4] [1899] P. 221.

[5] (1938) 55 T.L.R. 3; [1938] 4 All E.R. 181.

[6] [1952] 2 T.L.R. 934; [1952] 2 All E.R. 1035.

[7] (1912) 15 C.L.R. 538.

[8] (1952) 86 C.L.R. 424.

"as constructive desertion. The term has been a good deal "criticized, but for my part I must accept it that constructive "desertion, if proved, is sufficient ground for the dissolution of "the marriage.

"The matter has been very recently discussed in the High "Court in the case of *Baily* v. *Baily*.[8] That case makes it plain "that the test which has to be applied in these cases is one "either of actual intention by the husband to bring the matrimonial relationship to an end or an intention on his part to "persist in a course of conduct which any reasonable person "would regard as calculated to bring about such a result. It "is the second limb of that test which is relied upon in this case, "namely, that the facts are such as to show an intention on the "husband's part to persist in a course of conduct which any "reasonable person would regard as calculated to bring about a "rupture in the matrimonial relationship."

Dearman v. *Dearman*,[9] also an appeal from New South Wales, is in line with these decisions, foreshadowing the second limb of the rule laid down in *Baily* v. *Baily*.[10] *Bain* v. *Bain*[11] in substance affirms the same view; though it is a somewhat more complex decision, since it touches expressly on the problem created when there is a clash of intentions, or, if that be strictly impossible, a clash of intention with wish or desire, or aim.

Their Lordships will have to return to these, among other, Australian authorities and to say something about cases decided in England. But before doing so, they think it proper to deal with the judgment. It is unnecessary to analyse the evidence as the findings of fact are not in dispute.

It has been noted that the petition was filed on October 29, 1951, and particulars were supplied on November 26, 1951. None of the particulars relates to a period earlier than August 11, 1948. Yet the whole case was conducted, as regards evidence and argument, on the footing that the whole of the husband's behaviour from 1943 to 1948 was relevant. This seems to their Lordships an anomalous and regrettable state of affairs. However, no objection was raised to the excursion of the evidence far outside the limits covered by the pleadings, and the lesser evil is to treat the pleadings as amended so as to cover the additional matter.

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[8] 86 C.L.R. 424.

[9] (1916) 21 C.L.R. 264.

[10] 86 C.L.R. 424.

[11] (1923) 33 C.L.R. 317.

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The judgment of the Supreme Court of Victoria (Lowe J.) professes to be wholly based on the second limb of the formula in *Baily* v. *Baily*.[12] Thus in the Record, at p. 223, line 5, he says: "I have no doubt that the course of conduct which I have "described indicates an intention to persist in a course of conduct "which any reasonable person would regard as calculated to "bring about a rupture of the matrimonial relations, and conse- "quently I think that his conduct does amount to constructive "desertion." It is inherent in the logic of this formula that if the reasonable man would regard the course of conduct in which the husband intended to persist as calculated to bring the marriage to an end, it is not open to the alleged deserter to give evidence that that was the last thing he actually desired. Yet the logic is not quite rigidly observed, for the judge pays regard to the wife's warnings that she would leave the respondent if he persisted, a fact mainly relevant to his actual intention, and he deals on p. 223 at some length with the question whether the husband's appeals to the wife to return to him after the final separation were sincere or not.

On appeal the High Court dealt somewhat briefly with the case partly because (as Sir Owen Dixon C.J. explained in the later case of *Deery* v. *Deery* [13]) the facts were so overwhelming. Sir Owen Dixon delivered the main judgment, Fullagar and Kitto JJ. merely expressing agreement. The Chief Justice quoted [14] the actual words of which in *Baily* v. *Baily* [15] the High Court had held the criterion to consist: "The cases seem to "show that what must be proved is either an actual intention "to bring about a rupture of the matrimonial relation, or an "intention to persist in a course of conduct which any reason- "able person would regard as calculated to bring about such a "rupture."

The Chief Justice, like Lowe J., found that the facts of the case brought it within the second limb of this formula; he met the argument that de facto the husband never desired his wife to leave him with the following quotation from *Bain* v. *Bain* [16]: "A man may intend to retain his wife's presence, but also at the "same time to pursue a certain line of conduct. If at all hazards "he deliberately pursues that line of conduct, his intention to "retain his wife's presence is conditional on or subservient to "the other intention. If his conduct is such that his wife, as

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[12] 86 C.L.R. 424.
[13] (1954) Argus L.R. 269.
[14] 86 C.L.R. 432, 436.
[15] 86 C.L.R. 424, 426–7.
[16] 33 C.L.R. 317, 325.

"a natural or necessary consequence, is morally coerced into "withdrawing, it cannot be said with any truth that the husband "intends her to remain. He knows in that case that the result "of his deliberate act will be and is his wife's withdrawal, and, "therefore, in every real sense he intends that withdrawal."

He went on to point out that "on countless occasions he "must have been in the state of knowing that what he was "doing would necessitate her withdrawal." No doubt the Chief Justice had in mind that she had again and again warned him that she would leave if he persisted, and had in fact twice actually left him.

It will be observed that this judgment involves a slight recession from the severely objective rule which infers an intention to desert conclusively when certain conduct is established, since clearly the court thought that a purely subjective factor—the husband's de facto knowledge that she would leave—was relevant. There were already, their Lordships think, some signs of vacillation between a purely objective and the admission of certain subjective elements in *Bain* v. *Bain* itself.[16]

In the English decisions there is discernible a similar dualism. The courts which decided *Boyd* v. *Boyd*[17] and *Bartholomew* v. *Bartholomew*[18] certainly use language which suggest that if the respondent desires the partner to remain with him, then the petitioner cannot ever prove constructive desertion. In these cases the court applied a subjective test, *viz.*, the husband's intention. If intention bears the same meaning as desire, this reasoning, when pressed to its logical conclusion, leads to the result that a husband who desires his wife to stay in the matrimonial home simply in order that he may ill-treat her or make her a target for insult, cannot be guilty of constructive desertion. In *Hosegood* v. *Hosegood*[19] Denning L.J. (who thinks *Boyd* v. *Boyd*[20] was well decided and was a party to the *Bartholomew* decision[21]) conveniently summarizes the two rival strains of English authority in the following passage: He says[22]: "There "are at present two schools of thought about constructive "desertion. One school says that, in constructive desertion, as "in actual desertion, a husband is not to be found guilty, how"ever bad his conduct, unless he had in fact an intention to

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[16] 33 C.L.R. 317.

[17] 55 T.L.R. 3; [1938] 4 All E.R. 181.

[18] [1952] 2 T.L.R. 934; [1952] 2 All E.R. 1035.

[19] (1950) 66 T.L.R. (Pt. 1) 735.

[20] 55 T.L.R. 3.

[21] [1952] 2 T.L.R. 934.

[22] 66 T.L.R. (Pt. 1) 738.

"bring the married life to an end. This school admits that "there are many cases where he may be presumed to have that "intention. For instance, when a man deliberately makes his "wife's life unbearable, he may be presumed to intend to drive "her out, because he may be presumed to intend the "natural consequences of his acts. But this school says that "if in truth the facts negative any intention to bring the married "life to an end, the courts should not attribute it to him. For "instance, the conduct of an habitual criminal or an habitual "drunkard may be so bad that his wife is forced to leave him; "but he may be devoted to her, and the last thing he may intend "is that she should leave. In such a case this school of thought "would hold that there is no desertion: *Boyd* v. *Boyd*.[23] The "other school of thought does lip-service to the necessity for "such an intention, but says that, even if the husband had no "intention in fact to bring the married life to an end, yet he is "conclusively presumed to intend the natural consequences of his "acts: and if his conduct is so bad or so unreasonable that his "wife is forced to leave him, he must be presumed to intend her "to leave and he is guilty of constructive desertion, however "much he may in fact desire her to remain: *Sickert* v. *Sickert*,[24] "and *Edwards* v. *Edwards*.[25] *Buchler* v. *Buchler*[26] does not "resolve the difference between these two schools of thought. In "one passage Lord Greene M.R. seems to favour the first school, "for he cites *Boyd* v. *Boyd* (supra) with approval. In another "passage, however, he seems to favour the second school, for he "cites *Sickert* v. *Sickert* (supra) with equal approval."

He continues: "To my mind the views of the first school are "logically unanswerable. When people say that a man must be "taken to intend the natural consequences of his acts, they fall "into error: there is no 'must' about it; it is only 'may.' The "presumption of intention is not a proposition of law but a proposition of ordinary good sense. It means this: that, as a man "is usually able to foresee what are the natural consequences of "his acts, so it is, as a rule, reasonable to infer that he did "foresee them and intend them. But, while that is an inference "which may be drawn, it is not one which must be drawn. If "on all the facts of the case it is not the correct inference, then "it should not be drawn."

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[23] 55 T.L.R. 3.

[24] [1899] P. 278, 283–4.

[25] [1948] P. 268.

[26] [1947] P. 25; 63 T.L.R. 100; [1947] 1 All E.R. 319.

The conflict of opinion in the English cases appears again in *Simpson* v. *Simpson*,[27] where the view expressed in *Edwards* v. *Edwards*[28] is repeated, and in *Pike* v. *Pike*[29] where the Court of Appeal reaffirmed the propositions expressed in *Hosegood* v. *Hosegood*.[30]

These four cases so completely review the divergence which exists in this country that it would in their Lordships' opinion serve no purpose to quote from or refer to the many decisions whether given under the present law or at a time when adultery by a husband was not of itself a ground of divorce, but required the presence of some other factor, viz., cruelty or desertion.

Nor at this stage is it necessary to consider the effect of those cases in which it is claimed that one who continues to live with a mistress has been held guilty of desertion even though he did not admit her to the matrimonial home but desired to retain the consortium of his wife.

So far as the Australian cases are concerned there is not, as their Lordships apprehend, so marked a dichotomy, but the distinction between the instances in which desertion has been held to have been established and those in which the facts have been held to afford insufficient proof is a fine one. Apart from the cases already quoted, the place at which the line is drawn is most clearly exhibited in the difference of result between that reached by the High Court in the present case and their decision in the later case of *Deery* v. *Deery*.[31] In the latter case the High Court, by a majority, allowed an appeal by a wife against a finding that she had constructively deserted her husband on the ground that the incidents relied upon were due to the wife's permanent characteristics rather than to any design to drive the husband away: and therefore the evidence was insufficient to enable the court to infer that the respondent had an actual intention to bring about a rupture of the matrimonial relationship or to persist in conduct calculated in the mind of any reasonable person to bring about such a rupture. "As I read the evidence," said Dixon C.J., "the one thing which she never intended to "do was to drive her husband away." Later he continued: "The question whether she intentionally persisted in a course "of conduct which she knew was inconsistent with the continu- "ance of the relation or which any reasonable person would

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[27] [1951] P. 320; [1951] 1 T.L.R. 1019; [1951] 1 All E.R. 955.

[28] [1948] P. 268.

[29] [1954] P. 81n.; [1953] 1 All E.R. 232.

[30] 66 T.L.R. (Pt. 1) 735.

[31] (1954) Argus L.R. 262.

"regard as calculated to bring about a rupture of the matrimonial "relation may perhaps be a more doubtful question. But I have "reached the conclusion that a finding against her ought not to "be sustained." Of the present case Dixon C.J., who gave the leading judgment, said: "In *Lang* v. *Lang*,[32] where we thought "it unnecessary to deliver a considered judgment because the "facts appeared to be so overwhelming, we relied upon what we "had said in *Baily* v. *Baily*[33] but emphasized the difficulty of "distinguishing between an intention to destroy the matrimonial "relationship and such an intention as the passage already quoted "from the reasons of Irving C.J. in *Bain* v. *Bain*[34] postulates. "It amounts to an intention to persist in a course of conduct with "knowledge that it is completely inconsistent with the maintenance of the matrimonial relation."

In these two cases the results at which the High Court arrived were different, but in each two grounds for inferring desertion were accepted, viz., actual intention and intention inferred from conduct which any reasonable person would regard as calculated to bring the consortium to an end.

In spite of some of the expressions used in the cases both in England and in Australia it was not, as their Lordships understand, contended that certain types of action of necessity create an irrebuttable presumption that the party guilty of them must be held to intend to break up the marriage tie on the principle that a man must irrebuttably be held to intend the natural consequences of his acts. Indeed, in *Simpson* v. *Simpson*[35] the President (Lord Merriman) expressly said: "I venture to suggest that "in this jurisdiction, at any rate, we may continue to use the "time-honoured maxim" (i.e., a man must be taken to intend the natural consequences of his acts) "provided always that we "remember that it does not express an irrebuttable presumption "of law and that it is only to be applied in connexion with "conduct which can fairly be described as ill-treatment." Nor do those who hold the other view maintain that an intention deserendi may not legitimately be inferred from acts alone. In *Hosegood* v. *Hosegood*[36] Denning L.J. accepted the position that there are many cases where the husband may be presumed to have had the intention to end the marriage.

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[32] (1953) 86 C.L.R. 432.
[33] 86 C.L.R. 424.
[34] 33 C.L.R. 317.
[35] [1951] P. 320, 333.
[36] 66 T.L.R. (Pt. 1) 735.

The difference between the two views is rather what meaning is to be attached to the word " intention " and what evidence is sufficient to rebut a prima facie case.

Prima facie, a man who treats his wife with gross brutality may be presumed to intend the consequences of his acts. Such an inference may indeed be rebutted, but if the only evidence is of continuous cruelty and no rebutting evidence is given, the natural and almost inevitable inference is that the husband intended to drive out the wife. The court is at least entitled and, indeed, driven to such an inference unless convincing evidence to the contrary is adduced. In their Lordships' opinion this is the proper approach to the problem, and it must therefore be determined whether the natural inference has been rebutted in the present case.

The fact that the question at issue involves a consideration of the effect of the actions of one person upon another adds to the complexities of the case. But, apart from this, the distinction between intention and desire has to be borne in mind. A man may wish one thing and intend another—" Video meliora pro- " boque, Deteriora sequor "—and, indeed, as the High Court have pointed out, a man's intention does not necessarily always remain constant but fluctuates from time to time. Nevertheless, some general principle must be sought and adopted.

But before the question of the rebutting evidence is reached it has first to be determined what is the exact connotation of the word " intention " as used in the relevant cases.

In *Bain* v. *Bain* [37] the High Court visualizes the problem which may arise where the husband appears to be actuated by " intents " which conflict with, or contradict, each other. The answer given is in substance that in such a conjuncture the dominant intention must be ascertained and looked to. The passage from *Bain* v. *Bain* [37] which is cited by the High Court in the present case has already been set out.

Their Lordships are of opinion that this passage goes to the root of the matter. But they venture to question whether as a matter of strict terminology a man can be said to entertain conflicting " intentions." A man may well have incompatible desires. He may have an intention which conflicts with a desire: i.e., he may will one thing, and wish another, as when he renounces some cherished article of diet in the interest of health. But " intention " necessarily connotes an element of volition:

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[37] 33 C.L R. 317.

desire does not. Desires and wishes can exist without any element contributed by the will. What, then, is the legal result where an intention to bring about a particular result (be it proved directly or by inference from conduct) co-exists with a desire that that result should not ensue? That is the substantial point raised by this appeal. The issue may be put more concretely. What legal inference is to be drawn where the whole of a husband's conduct is such that a reasonable man would know—that the particular husband must know—that in all human probability it will result in the departure of the wife from the matrimonial home? Apart from rebutting evidence this, in their Lordships' opinion, is sufficient proof of an intention to disrupt the home: but suppose, further, a husband's hope is that in some way his actions will not produce these natural consequences, that the wife will stay and that the home will not be disrupted. Where a man's own actions are concerned and not their effect on another, the answer is easy. If he desires to resist temptation but yields to it his intention is evidenced by his acts. His better self is, it may be, overborne, yet in the end his intention is to yield. Where, however, the effect of his actions upon other people is concerned and there is no certainty but only a high degree of probability as to what the result will be, is a court to say that if he did entertain an unjustified hope that his wife would stay, the intention normally to be inferred from his acts is rebutted, and is the correct conclusion that he did not intend to drive her out? In their Lordships' opinion no such conclusion is justified. If the husband knows the probable result of his acts and persists in them, in spite of warning that the wife will be compelled to leave the home, and indeed, as in the present case, has expressed an intention of continuing his conduct and never indicated any intention of amendment, that is enough however passionately he may desire or request that she should remain. His intention is to act as he did, whatever the consequences, though he may hope and desire that they will not produce their probable effect.

To say that it is not enough unless he knows that separation must inevitably result from his actions is to ask too much. Men's actions and judgments are not founded upon certainty—in most cases certainty is unascertainable—but on probabilities. No doubt a high degree of probability is required, but no more.

With these considerations in mind, can it be said that the appellant has rebutted the natural inference, which would be drawn from his acts if no countervailing testimony was given? In their Lordships' opinion no sufficient ground has been given for rejecting the finding of the High Court.

It is true that Lowe J. founded his judgment upon the wording used by the High Court in *Bain* v. *Bain*,[37] in which one of the tests is expressed to be an intention to persist in a course of conduct which any reasonable person would regard as calculated to bring the matrimonial relationship to an end, and in their Lordships' view this is too objective a requirement. But the High Court took a more subjective standard after examining the evidence as a whole. They found, and, as their Lordships think, were entitled to find, that the appellant must have known that what he was doing would necessitate her withdrawal if she acted as any reasonable creature would. Such a finding, if warranted, is in their Lordships' opinion decisive of the case, and in spite of Lowe J.'s reliance upon what may be regarded as a purely objective test there is in their view ample ground for coming to the conclusion that the appellant must have recognized the gravity of the effect of his behaviour though he hoped and desired that it might not have its natural result.

The Australian courts are ready to draw the inference of intention on evidence of the same nature as that adduced in the present case and have twice approved of its decision before it reached their Lordships' Board, once, as already stated, in *Deery* v. *Deery*,[38] and again in the High Court in *Sharah* v. *Sharah*,[39] which so far as their Lordships are aware was not reported at the time of the hearing before them, but of which they were furnished a transcript.

So far as England is concerned, their Lordships' opinion is fortified by the cases which decide that constructive desertion is to be inferred where a husband retains a mistress in spite of the wife's protests, even though the mistress was not brought into contact with the wife and the adulterous association took place away from the matrimonial home. So far as their Lordships are aware, such actions have always been regarded as justifying the wife's withdrawal and a holding that she had been constructively deserted if she leaves the house. *Farmer* v. *Farmer*,[40] *Pizzala* v. *Pizzala*,[41] *Garcia* v. *Garcia*,[42] *Koch* v. *Koch*[43] and *Sickert* v.

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[37] 33 C.L.R. 317.

[38] (1954) Argus L.R. 262.

[39] Unreported.

[40] (1884) 9 P.D. 245.

[41] (1896) 12 T.L.R. 451.

[42] (1888) 13 P.D. 216; 4 T.L.R. 702.

[43] [1899] P. 221.

Sickert[44] are examples of this outlook and (unless one takes the view of the minority in the Australian case of *Donelly* v. *Donelly*[45]) support the view that, whatever the husband's desire may be, this behaviour of itself establishes an intention to break up the married life.

Before they conclude their review one proposition propounded on behalf of the respondent should be mentioned, viz., that the law permitting divorce for desertion first enacted in Victoria in 1890 has been re-enacted in 1916 and in 1928, and between the first and later dates the courts of that State had interpreted the word "desertion" as bearing the objective meaning contended for by the respondent. Having regard to the opinion upon the main question it is unnecessary for their Lordships to express an opinion on this matter. As at present advised they would only say they are not satisfied that the law as laid down before 1928 is sufficiently clear to warrant an assumption that an animus deserendi must always be inferred where the deserter's action warrants it, whatever his real intention may be shown to be.

But for the reasons they have indicated their Lordships will humbly advise Her Majesty to dismiss the appeal. The appellant must pay the respondent's costs as between solicitor and client of the appeal to their Lordships' Board.

Solicitors: *Blyth, Dutton, Wright & Bennett; Davenport, Lyons & Barker.*

[44] [1899] P. 278.

[45] (1939) 61 C.L.R. 577.

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Oct. 26, 27, 28;
Nov. 1, 2, 3;
Dec. 1.

[HOUSE OF LORDS.]

SHEPHARD AND ANOTHER . . . . . APPELLANTS;
AND
CARTWRIGHT AND OTHERS . . . . . RESPONDENTS.

Advancement — Presumption — Gift to children — Qualified and conditional gifts—Shares registered by father in names of children—Children not informed of transaction—Shares sold and proceeds

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* *Present*: VISCOUNT SIMONDS, LORD MORTON OF HENRYTON, LORD REID, LORD TUCKER and LORD SOMERVELL OF HARROW.

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SHEPHARD v. CARTWRIGHT.

dealt with under mandates signed by children—Children unaware of nature of transactions until father's death—Whether entitled to claim on basis of advancement—Admissibility in evidence of donor's subsequent conduct.

Presumption—Evidence—Intention—Subsequent conduct.

In 1929 a father, with an associate, promoted several private companies and caused a large part of the shares for which he subscribed to be allotted in varying proportions to his three children, one of them being then an infant. There was no evidence as to the circumstances in which the allotments were made, nor whether any share certificates were issued. The companies were successful and in 1934 the father and his associate promoted a public company which acquired the shares of all the companies for £700,000, of which £300,000 was to be satisfied in cash and £400,000 in shares. The children signed the requisite documents at the request of their father without understanding what they were doing. He received the cash consideration and at various times sold, and received the proceeds of sale of, their shares in the new company. He subsequently placed to the credit of the children respectively in separate deposit accounts the exact amount of the cash consideration for the old shares and round sums in each case equivalent to the proceeds of sale of the new shares. Later he obtained the children's signatures to documents, of the contents of which they were ignorant, authorizing him to withdraw money from these accounts, and without their knowledge he drew on the accounts, which were by the end of 1936 exhausted, part of the sums withdrawn being dealt with for the benefit of the children but a large part remaining unaccounted for. He died in 1949. In an action against his executors:—

Held, that the shares registered in the names of the children were an advancement, since, when shares were so registered there was a presumption of advancement. The acts and declarations of the parties before or at or immediately after the time of purchase, constituting part of the same transaction, were admissible in evidence for or against the party who did the act or made the declaration; subsequent declarations were admissible as evidence only against the party who made them and not in his favour. No inference as to the intention of the deceased at the time of the vesting could be drawn from his manner of dealing with other property which, before or after the transaction in question, he had transferred to one or other of the children, since such evidence was not admissible. Further, the fact that the children acted under their father's guidance without knowledge or inquiry precluded the admission in evidence of their conduct as constituting admissions against their own interest.

Decision of the Court of Appeal (sub nom. *In re Shephard, Shephard* v. *Cartwright*) [1953] Ch. 728; [1953] 2 All E.R. 608 reversed.

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APPEAL from the Court of Appeal (Evershed M.R., Denning and Romer L.JJ.).

This was an appeal from an order of the Court of Appeal dated July 1, 1953, affirming a judgment of Harman J., dated February 19, 1953, in favour of the defendants in an action against the first two respondents in this appeal, Joseph Osmond Cartwright and Hedley Spain Dunk, as executors of Philip Edward Shephard, deceased, to establish that certain shares which he caused to be registered in the names of his children, the appellants Richard David Shephard and Mrs. Winifred Maud Cartwright, were an advancement and to obtain consequential relief. In the action the appellants were plaintiffs. The third respondent, Philip Edward Shephard, another child of the deceased, was a party attending. The appeal came before the House of Lords by leave granted by the House on December 10, 1953.

By an order dated January 12, 1953, and made by Harman J. in this action it was ordered (inter alia) that the following inquiries be made: (5) An inquiry whether any and which of the children of the deceased derived or received from him in his lifetime any and what sums of money or other estates or property in the nature of advancements. (6) (a) An account of the proceeds of the sale of the shares formerly standing in the name of Richard David Shephard come to the hands of the deceased, and (b) an inquiry whether Richard David Shephard was a creditor of the deceased upon the amount (if any) found due on taking the account. (7) An inquiry whether Richard David Shephard was entitled to a first charge or any charge on 580 shares of £1 each in Woodside Park Garden Suburb Ld. standing in the deceased's name at the time of his death to secure the sum of £23,960 8s. 9d. or some other and what sum. (9) (a) An account of the proceeds of sale of the shares formerly standing in the name of Mrs. Winifred Maud Cartwright come to the hands of the deceased, and (b) an inquiry whether she was a creditor of the deceased in respect of the amount (if any) found due on taking the account. (10) An inquiry whether (subject to a claim by Philip Edward Shephard to 250 of the shares) Mrs. Winifred Maud Cartwright was entitled to all or any and if so which of the 450 shares of £1 each in Philip Edward Shephard Estates Ld. registered in the name of the deceased at his death. (11) An inquiry whether Richard David Shephard and Mrs. Winifred Maud Cartwright were jointly entitled to a first charge on any sum recovered by the executors representing the balance of £33,128 18s. 11d. standing to the credit of the loan account of the deceased with Philip Edward Shephard Estates Ld. at the date of his death.

Harman J. treated these inquiries as having been adjourned to him, and on February 19, 1953, he held that the shares in question were not advancements.

The facts are fully set out in the opinion of Viscount Simonds.

Charles Russell Q.C. and *Victor Coen* for the appellants. The main question is whether or not there is evidence establishing that in 1929 the deceased intended that his children should hold the shares in question as trustees for him. There is no such contemporaneous evidence. The matter should be determined on a short view of the facts relating to the transaction, but even if a complete view of the facts is admissible that also leads to the conclusion that the deceased did not intend to establish a trust in his own favour. There is no possible alternative but an advancement or a trust for the father.

Since the shares were registered in the name of a child there was no presumption of a resulting trust in favour of the deceased. Because he procured the shares to be allotted to the children and they became the registered proprietors, in default of evidence establishing the contrary, there is presumed to have been an advancement, so that they became the beneficial as well as the legal owners. There is no evidence establishing the contrary. The settled law is that if A buys property in the name of B, who is no relative, B is held to be trustee of that property for A, even though he may not have heard of it, but if B is a child of A no such trust is presumed and the law presumes that the legal and beneficial ownership is in the child, so that the onus, which is a particularly heavy one, is on those who would seek to rebut the presumption and establish an absolute trust for the father.

As to the admissibility of evidence tending to rebut the presumption of an advancement, see Underhill on Trusts, 10th ed., pp. 186–7, Ashburner's Equity, 2nd ed., pp. 110–1, White and Tudor's Leading Cases in Equity, 9th ed., vol. II, p. 775, and Lewin on Trusts, 15th ed., p. 152. Subsequent acts of the parent are in general inadmissible to support a resulting trust in his favour, as is also evidence of his subsequent declarations. The law does not blindfold the tribunal but puts blinkers on it in the matter of such evidence, lest it be misled by irrelevance. It has recognized the temptation there is for a father to change his mind and the possibility of his forgetting what he had intended on a previous date. The admissible evidence in rebuttal (other than sworn evidence) is thus limited to acts, circumstances and declarations leading to or forming part of the transaction or so immediately following and connected with it as in effect to be contemporaneous with or form part of it. An exception, not here material, is to be found in subsequent acts or declarations by or in the presence of the person in whose favour the presumption arises. Subsequent acts are found in this branch of the law to be peculiarly liable to reflect, not the original intention of the donor, but a subsequent feeling, and so they are always regarded as ambiguous. Other transactions can only be used to confirm and fortify direct evidence, without which such transactions cannot be relied on.

In *Grey* v. *Grey*[1] the evidence in question tended to show acquiescence and an admission by the donee of the beneficial interest of the donor. No question of admissibility of evidence was in dispute. No principle is laid down that evidence of subsequent conduct is admissible, but the acts set out in the report show that a strong case is required to overset the presumption of an advancement. *Pole* v. *Pole*[2] was likewise a case of acquiescence by the alleged donee whose subsequent acts were said to constitute very strong evidence. In *Dyer* v. *Dyer*[3] Hotham C.B. observed that it was said that intention must be proved by concomitant acts, yet a subsequent devise of the property by the alleged donor (as happened in that case) was a strong act of ownership and (in that case) it coincided with the possession and enjoyment of the property by the alleged donor (who had entered and taken possession at the time of the original transaction). He regarded the presumption of advancement as a rule of property well established and held that the donee took beneficially as an advancement. In *Finch* v. *Finch*,[4] where the subsequent will of a third party was received in evidence, Lord Eldon L.C. said that "even if the father made such will, having "made no such declaration at the time of the purchase, that will "could not have been looked to as evidence of what he meant by "the act of purchase," the father being the alleged donor. In *Murless* v. *Franklin*[5] evidence of acts which, though not part of the same transaction, indicated a course of dealing was expressly rejected. In *Crabb* v. *Crabb*[6] it was held that a codicil to an alleged donor's will, executed two years after the transfer of the alleged gift, could not be admitted to qualify or explain the effect of the transaction. Lord Brougham L.C. said that "nothing " . . . ex post facto . . . can ever be allowed to alter what had " already been done," and that, the transfer having been unequivocal, there was no place for explanation by the codicil, no reliance could be placed on it and it could have no operation as explaining or qualifying the gift.

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[1] (1677) 2 Swanst. 594, 597.

[2] (1748) 1 Ves.Sen. 76.

[3] (1788) 2 Cox 92, 95, 98.

[4] (1808) 15 Ves. 43, 48, 50, 51.

[5] (1818) 1 Swanst. 13.

See also *Sidmouth* v. *Sidmouth*[7]; *Christy* v. *Courtenay*[8]; *Devoy* v. *Devoy*[9]; *Bone* v. *Pollard*[10]; *Jeans* v. *Cooke*[11]; *Dumper* v. *Dumper*[12]; *Williams* v. *Williams*[13]; *Hepworth* v. *Hepworth*[14]; *Stock* v. *McAvoy*[15]; *Fowkes* v. *Pascoe*[16]; *Marshal* v. *Cruttwell*[17]; *Stamp Duties Commissioner* v. *Byrnes*,[18] and *Warren* v. *Gurney*.[19]

Even if the subsequent transactions sought to be relied on are admissible (which is denied by the appellants), they tend to support the presumption of an advancement, as does the evidence agreed to be admissible. The evidence does not establish that the dealings by the deceased in 1934 with the shares originally allotted and with the proceeds of sale thereof were part of the original transaction in 1929, nor does it establish a course of dealing. There is no evidence of any other transaction where the deceased divided his property, retained an absolute title to one part, put other unequal parts in the names of his wife and three children and accounted to his wife and elder son for the proceeds of sale attributable to the parts in their names but did not account in full to the appellants. If one seeks to infer a characteristic in one transaction from a whole series of other transactions one must be sure that those other transactions have the characteristic in question. For example, if one has a row of similarly bound volumes all of poetry and one paper-backed volume, one might infer that it was also of poetry. But in a row in which there were books which might be fiction or poetry or biography it would be a mere guess to assume that the odd volume was of poetry. Here it is impossible to infer from what little is known of the other transactions that there was not an advancement. To rebut the presumption the grounds must be substantial. The dealings of the deceased here in question occurred more than four years after the original allotments. There is no evidence of any act by him between 1929 and 1934 which is associated with the registration of the shares in the names of the appellants. During that period the value of the shares had undergone so great a change that it cannot be said that there was any close bond of association between the original allotments in 1929 and the eventual dealings with them in 1934. The evidence indicates that the appellants were not mere nominees but were entitled to a beneficial interest.

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[6] (1834) 1 My. & K. 511, 517, 518–9.

[7] (1840) 2 Beav. 447, 453.

[8] (1849) 13 Beav. 96.

[9] (1857) 3 Sm. & G. 403.

[10] (1857) 24 Beav. 283.

[11] (1857) 24 Beav. 513.

[12] (1862) 3 Giff. 583.

[13] (1863) 32 Beav. 370.

[14] (1870) L.R. 11 Eq. 10.

[15] (1872) L.R. 15 Eq. 55.

[16] (1875) L.R. 10 Ch. 343.

[17] (1875) L.R. 20 Eq. 328, 329.

[18] [1911] A.C. 386; 27 T.L.R. 408.

[19] [1944] 2 All E.R. 472.

The effect of the respondents' view of the allotment of the shares to the appellants is to impute to the deceased an intention to defraud the Revenue. The court would consider the circumstances very closely before it stamped a man as a deliberate defrauder. If it was necessary to do so in order to overthrow the presumption of an advancement, the case would have to be remarkably strong. There is nothing to show that the deceased was not an honourable man.

The following propositions summarize the appellants' case: (1) There is a presumption of advancement in 1929 of the shares then worth a few hundred pounds.

(2) There is no evidence on the point of any kind in the five-year period to 1934 when the circumstances of value had radically changed.

(3) Certain facts are, on authority long accepted, wholly inadmissible as evidence tending to rebut the presumption, i.e., the facts that in 1934 and onwards the deceased acquired control of the shares and proceeds of sale and dealt with them without reference to the appellants as he thought fit; those facts are merely the grounds of complaint in the claim. Harman J. and Denning L.J. were wrong in rejecting the authority to this effect. Evershed M.R. was wrong in expressing uncertainty thereon. Romer L.J. was right in accepting that authority.

(4) Romer L.J. was, however, wrong in saying that in this case the subsequent conduct can be treated, in effect, as part of the res gestae of 1929.

(5) Romer L.J. was further wrong in drawing any inference from a so-called course of dealing. Even if in theory such an approach is possible, it is wholly inapplicable to the facts of the present case.

(6) The presumption is in fact most strongly supported by admissions, though the appellants do not need them: viz. (i) tacit acceptance of Dunk's presumption that a proportion of the proceeds of sale belonged to the children; (ii) an express statement to Dunk as to the beneficial ownership of the shares in connexion with the dividend for tax purposes; (iii) instructions to Dunk that deposit interest on the proceeds of sale was taxable income of the children; (iv) inference from an express reference in the contract of sale of 1934 to nomineeship in the case of the Meyer shares. These admissions are admissible, though superfluous, evidence to support the presumption of advancement, while still excluding the dealings of the deceased as evidence to rebut it.

(7) Even if the subsequent dealings of the deceased were admissible in evidence, they would have no weight sufficient to overset the presumption, particularly one so strongly supported by admissions. The reason is that those subsequent dealings in 1934 and onwards are no guide to his intentions in 1929. They occurred in totally altered circumstances of value. They are intrinsically ambiguous. They may equally well reflect (a) change of intention; (b) forgetfulness of earlier intention; (c) "wishful "thinking" as to earlier intention, having regard to the vast change in values and the greatly widened difference in values between the properties of the children; (d) muddled thinking about the legal position, the testator thinking that he had given about £1,200 to these children, not these vast sums; (e) the patriarchal view of a man who was a law unto himself that he was morally entitled, notwithstanding the legal rights of the children, to deal with their property, which came from his pocket and industry, as he thought best for the family including himself.

(8) It is particularly unjustifiable to hold and find that the subsequent dealings in 1934 must show that he ab initio intended and considered the shares to be his on the ground that otherwise those dealings would be most reprehensible, when that finding involves calculated tax frauds on his part—an implication which only Harman J. faced in his judgment.

(9) In any event, the presumption that the whole beneficial interest coincides with the legal interest is not overset except by establishing an intention to constitute the legal owner a bare trustee for the provider of the purchase-money. Something "betwixt and between" will not suffice. This must be so when the ignorance of the legal owner precludes a bargain or understanding. In each case the transfer must be made on terms of

a formal express trust if some complicated trust is intended. The finding of an advancement by the Court of Appeal is therefore fatal to the respondents.

Arthur Mulligan for the respondent executors. It is the duty of the trustees to put such facts as are within their knowledge and are relevant before the court, and to make such submissions as may protect the other beneficiaries and the creditors.

On the evidence the deceased in 1929 put the shares in the names of his children to be held either until he chose to give them beneficial interests or until he should otherwise dispose of those shares, either giving the children or some other person the proceeds of sale or some part of the proceeds. At the time of the registration of the shares in the children's names as shareholders he had no intention of making a gift, but it may well have been his intention to give a beneficial interest in the future. In 1929 he either intended to make an out-and-out gift or he did not, and one arrives at his intention to deal with the shares in a certain way from a course of dealing with other property by him.

From his course of dealing in other transactions, both before and after 1929, it appears that (a) where he intended to make an absolute and uncontrolled gift to a child he informed that child of the fact and stated that the subject-matter was a gift for him or her, but (b) in other cases where he purchased or transferred property in or into the name of a child it was his intention to remain the beneficial owner of it unless or until he elected to inform the child of the fact and of his intention to make a gift.

As to the admissibility of subsequent acts and declarations of a donor, when these are made in relation to the subject-matter of the alleged gift they are not admissible, because they are more likely to be the result of a change of intention than when they relate to unconnected properties dealt with by him in the same way as was the property which was the subject of the alleged gift. A man's intention is always a matter of speculation. Whether he was the sort of man to act as he is alleged to have done depends on evidence, and evidence of his dealings with properties other than those which are the subject-matter of the gift should be received. If he had been a trained lawyer it might have been harder to imply the intention put forward by the respondents.

The relevant authorities are *Murless* v. *Franklin*[20]; *Bone* v. *Pollard*[21]; *In re Gooch*[22]; *Hepworth* v. *Hepworth*[23]; *Marshal*

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[20] 1 Swanst. 13, 19.

[21] 24 Beav. 283.

[22] (1890) 62 L.T. 384; 6 T.L.R. 224.

[23] L.R. 11 Eq. 10.

v. *Cruttwell*[24]; *Jones* v. *Lock*[25]; *In re Howes*[26]; *Fowkes* v. *Pascoe*,[27] and *Jeans* v. *Cooke*.[28]

It is admitted that the acts and declarations of the parties before or at the time of the transaction or immediately after it are admissible. But contemporaneousness does not really come into the matter. It is a question of the surrounding circumstances, and of these one must have an elastic conception. The sphere of these has to be sufficiently extended to accommodate the length of time and all the facts necessary to throw light on the donor's intention. The conception of the res gestae is to be similarly extended.

In 1929 the deceased cannot have intended to make gifts of these shares to the children, for, if he had, he could not as an honourable man have dealt with them subsequently as he did. For all practical purposes he had dominion over them as against the children. They did not know that the shares were registered in their names and so there can have been no gift to them: *Cochrane* v. *Moore*.[29]

Further, even if the deceased constituted himself or became a trustee or agent for the children in respect of the moneys paid by him into the deposit accounts in their names, he so constituted himself or became a trustee or agent only by reason of and upon each withdrawal of money by him from the deposit account, and then in each case to the extent of the money withdrawn and not otherwise. Therefore the trust did not arise before, but only by reason of, the transaction complained of. Consequently the deceased became and was entitled to the protection of the Limitation Act, 1939, and the claims of the children to or in respect of those moneys are barred. The relevant sections are sections 19 and 31 (1)—the definition of "trust": see *Taylor* v. *Davies*[30] and *Clarkson* v. *Davies*.[31] The wrongful act, if any, committed by the deceased was in drawing the money out of the bank otherwise than for the purpose of accounting for it to the children. Before that wrongful act he had not become a trustee of the money for the children and he did not become a trustee then because he was a thief. It is as if the children had given the deceased directions to pay the proceeds of sale into the bank in their names. Payment into the bank discharged him of his previous trust.

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[24] L.R. 20 Eq. 328, 329.

[25] (1865) L.R. 1 Ch. 25.

[26] (1905) 21 T.L.R. 501.

[27] L.R. 10 Ch. 343, 348, 349.

[28] 24 Beav. 513.

[29] (1890) 25 Q.B.D. 57, 64, 66–7, 68; 6 T.L.R. 296.

[30] [1920] A.C. 636, 646, 648, 650.

[31] [1923] A.C. 100, 116.

As to the nine points put forward by the appellants: (1) This is not disputed. (2) This is admitted so far as the shares in question are concerned, but there is evidence of dealings with other properties during that period. (3) Though the matters referred to may not be enough to rebut the presumption of an advancement, they can be taken into account with other matters to show a contrary intention and for that purpose only. When one takes the whole surrounding circumstances into account the facts become part of the prolonged res gestae. There is a large expanding circumference both as to time and circumstances. When all the surrounding circumstances are taken into account the judgments below fall into line. (4) This has been dealt with already. (5) The course of dealing should be considered if the circumstances show one. From the course of dealing here the inference to be drawn is that the deceased did not intend to make a gift of these shares. *In re Freeland* [32] is right, and it was open to the deceased to act on his intention that the gift was not to take effect until he had used the shares for the purposes which he had in view, and that meanwhile the shares were not to be at the disposal of the children. (6) The question of the admissions is for the House to determine. This point is left to counsel for the last respondent. (7) Once there are other surrounding circumstances the subsequent dealings become additional matters to be taken into account. (8) This point is only a repetition. All the circumstances must be taken together and the aggregate is sufficient to rebut the presumption. (9) This point depends on the view which the House takes of the facts.

F. B. Alcock for the respondent, Philip Edward Shephard. The circumstances of this case are inconsistent with an advancement: see *Scawin* v. *Scawin*.[33]

The only cases which lay down in all its strictness the rule that evidence in rebuttal of the presumption of an advancement must be contemporaneous are *Christy* v. *Courtenay*,[34] *Williams* v. *Williams* [35] and *Jeans* v. *Cooke*.[36] It is to be noted, however, that in the first case Lord Langdale M.R. spoke of the evidence being "mainly, if not exclusively, of contemporaneous circumstances"; in the second Romilly M.R. used the expression

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[32] [1952] Ch. 110, 121; [1952] 1 All E.R. 16.

[33] (1841) 1 Y. & C.C.C. 65.

[34] 13 Beav. 96, 98–9.

[35] 32 Beav. 370, 372.

[36] 24 Beav. 513, 521.

"accompanying and contemporaneous," the former word being a modification, and in the third case the expression he used was "contemporaneous or nearly so," though he discussed subsequent events. Before then the cases laid down no such rule: see *Grey* v. *Grey*,[37] *Pole* v. *Pole*[38] and *Dyer* v. *Dyer*.[39] More recent decisions have modified it: see *Bone* v. *Pollard*,[40] *Dumper* v. *Dumper*,[41] *Stock* v. *McAvoy*,[42] *Fowkes* v. *Pascoe*[43] and *Marshal* v. *Cruttwell*.[44]

Everything that happened to the shares from 1929 to the sale should be taken into consideration. It is significant that having caused the children to be registered as the owners of the shares in 1929, the deceased gave them no information with regard to the matter, and also they had no share certificates. The question is: What was the deceased's mind then?

From 1929 onwards a connexion is established between one event and the next, each interlocking and forming part of the res gestae, features of which were that at the time of the alleged gift the deceased never told the children about it; that no share certificates were given to them; that he controlled the company which declared no dividends, though large profits were being made; that when he wished to deal with the shares he procured powers of attorney from the children. Because all the facts, acts and circumstances interlock, the whole transactions are admissible. It would be wholly unrealistic to stop short at the alleged gift, because then the case would not be seen in its proper perspective, nor would it be seen what was in the deceased's mind. If the whole transaction is admissible the result is that the presumption of an advancement is rebutted, for it leads to the conclusion that the deceased was all along very careful to retain control of the shares. Once he had settled his business to his satisfaction he made provision for the children.

Evidence of other transactions is admissible as tending to show a course of dealing between parent and child, the object again being to show what was in the deceased's mind. They are surrounding circumstances which either support or rebut the presumption and so are material to the question.

The conduct of the appellants is admissible against them as an admission on their part. They executed the agreement and the powers of attorney which enabled their father to deal with the

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[37] 2 Swanst. 594.
[38] 1 Ves.Sen. 76.
[39] 2 Cox 92.
[40] 24 Beav. 283, 287.
[41] 3 Giff. 583, 590.
[42] L.R. 15 Eq. 55.
[43] L.R. 10 Ch. 343, 349, 352.
[44] L.R. 20 Eq. 328, 329, 330.

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shares and the proceeds of sale. They must be presumed to have had knowledge of the contents of those documents. They asked no questions. They did not complain that their father had had the agreement and the powers of attorney drawn up without reference to them.

The appellants urged that there was no possible alternative between an advancement and a trust for the deceased. But what Romer L.J. said [45] on this point in the Court of Appeal is right.

Russell Q.C. in reply. One cannot in law give a person something absolutely on condition that he must not deal with it and that the donor may take it away whenever he wants. *Young* v. *Sealey* [46] is not relevant. It cannot be allowed that the deceased was in effect clearing the site for a building which he might never erect. If the presumption of an advancement is to be rebutted, a trust must be established, and its terms must be established, and they must be such as the law allows. Here the deceased has been trying to reserve to himself a benefit which the law says he cannot reserve.

It is hard to understand the argument under the Limitation Act. Denning L.J. dealt with this point in the court below and gave his reasons.[47] These are sound. See also the Limitation Act, 1939, s. 19, and the definition of "trust" in the Trustee Act, 1925, s. 68 (17). If a man puts the money of another into an earmarked account he is a trustee. To put money into the bank for another person without informing him of the fact, and afterwards getting permission to draw on it, is the equivalent. One cannot discharge oneself of a trusteeship by adopting a course which is substantially the same as putting money into an earmarked account. The two Privy Council cases cited by the respondents on this point differ from the present case.

As to costs, should the appeal succeed the solicitor and client costs of the first two respondents and of the appellants should be paid out of the estate. The third respondent should bear his own costs.

Their Lordships took time for consideration.

December 1. VISCOUNT SIMONDS. My Lords, this appeal raises questions in regard to the application of the equitable doctrine of advancement which I had regarded as well settled long ago.

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[45] [1953] Ch. 725, 765; [1953] 2 All E.R. 608.

[46] [1949] Ch. 278; [1949] 1 All E.R. 92.

[47] [1953] Ch. 728, 754–7.

The following facts form the background of the case. On July 20, 1949, one Philip Edward Shephard died leaving a substantial estate subject to the claims to which I shall presently refer. The respondents, Joseph Osmond Cartwright and Hedley Spain Dunk and his son, the appellant, Richard David Shephard, are the executors of his will which was made on December 4, 1946. In addition to Richard, who was born on November 2, 1913, the deceased, as I will call him, had two other children, an elder son, the respondent, Philip Edward Shephard, and a daughter, the appellant, Winifred Maud Cartwright, who was born on October 25, 1906.

In the year 1929 the deceased, who was then employed in an insurance brokerage business, engaged upon speculative building ventures in association with one Meyer, and for that purpose promoted six private companies and caused the following shares of £1 each, for which he had subscribed in cash, to be allotted to and registered in the names of himself, his wife and his three children whom I have named :

	The Deceased	*His Wife*	*Philip*	*Winifred*	*Richard*
New Ideal Homesteads Ld.	200	—	100	100	100
Kent & Sussex Building Co. Ld.	100	100	—	100	450
Northend Machinery & Motor Services Ld.	125	—	125	125	125
Reliance Electrical Co. Ld.	100	—	—	—	50
N.I.H. Haulage Ld. ...	100	—	150	100	150
Mastercraft Homesteads Ld.	100	—	—	—	—

It has not been disputed that these shares were at that time of the value of £1 each or thereabouts. An equal number of shares of each company was registered in the names of the deceased associate, Meyer, and members of his family. Neither of the appellants, of whom Richard was then aged 16 and Winifred 23, had any knowledge of this transaction. No evidence was given of the issue of any share certificates, but it seems reasonably certain that none were given to Richard or Winifred. Whether Philip had any is unknown. Strangely, he elected to give no evidence on this or any other matter.

At the time of this transaction Richard and Winifred lived at home under their father's protection and, though it appears that relations between them and his wife, their stepmother, were somewhat strained, there is evidence that he recognized in full his paternal obligations, while they regarded him with more than usual filial reverence.

I think it well, then, to pause in this year 1929 and to ask what was the result in law or equity of the registration, in the names of his children of shares for which he supplied the cash, and I pause in order to examine the law, because it appears to me that the only two facts which are at this stage relied on to rebut the presumption of advancement, viz., that the children were ignorant and that certificates were not given to them, are of negligible value.

My Lords, I do not distinguish between the purchase of shares and the acquisition of shares upon allotment, and I think that the law is clear that on the one hand where a man purchases shares and they are registered in the name of a stranger there is a resulting trust in favour of the purchaser; on the other hand, if they are registered in the name of a child or one to whom the purchaser then stood in loco parentis, there is no such resulting trust but a presumption of advancement. Equally it is clear that the presumption may be rebutted but should not, as Lord Eldon said, give way to slight circumstances: *Finch* v. *Finch.*[1]

It must then be asked by what evidence can the presumption be rebutted, and it would, I think, be very unfortunate if any doubt were cast (as I think it has been by certain passages in the judgments under review) upon the well-settled law on this subject. It is, I think, correctly stated in substantially the same terms in every textbook that I have consulted and supported by authority extending over a long period of time. I will take, as an example, a passage from Snell's Equity, 24th ed., p. 153, which is as follows:

> "The acts and declarations of the parties before or at "the time of the purchase, or so immediately after it as to "constitute a part of the transaction, are admissible in "evidence either for or against the party who did the act or "made the declaration . . . But subsequent declarations are "admissible as evidence only against the party who made "them, and not in his favour."

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[1] (1808) 15 Ves. 43.

I do not think it necessary to review the numerous cases of high authority upon which this statement is founded. It is possible to find in some earlier judgments reference to "sub-"sequent" events without the qualifications contained in the textbook statement: it may even be possible to wonder in some cases how in the narration of facts certain events were admitted to consideration. But the burden of authority in favour of the broad proposition as stated in the passage I have cited is overwhelming and should not be disturbed.

But although the applicable law is not in doubt, the application of it is not always easy. There must often be room for argument whether a subsequent act is part of the same transaction as the original purchase or transfer, and equally whether subsequent acts which it is sought to adduce in evidence ought to be regarded as admissions by the party so acting, and whether, if they are so admitted, further facts should be admitted by way of qualification of those admissions.

Before, however, I ask whether evidence of any subsequent events is in this case admissible either because they formed part of the original transaction or because they were in the nature of admissions, I must shortly examine an argument which has been pressed upon this appeal and appears to have carried particular weight with Romer L.J. It is that an inference about the intention of the deceased at the time of the vesting of the relevant shares in the applicants can be drawn from his manner of dealing with other property which before or after the transaction in question he had transferred to one or other of his children. I cannot regard such evidence as admissible or, if admissible, as of any value. If the argument only means that such other transfers ought to be regarded as "part of the same transaction," then it fails because it is altogether too artificial so to regard them. If, on the other hand, the argument is intended to introduce a new category of admissible evidence, viz., acts which, though not part of the same transaction, yet indicate a course of dealing, I must reject it on the ground that it cannot be supported by reason or authority. This form of evidence was expressly rejected by Lord Eldon in *Murless* v. *Franklin*,[2] and I am not aware of any attempt having been again made to introduce it.

The first question, then, is whether any subsequent events are admissible as part of the original transaction to prove that the deceased had not in 1929 the intention of advancement which the law presumes. My Lords, for nearly five years nothing happened which could by any means be regarded as throwing light upon his original intention, but an event did happen which would amply explain a change in that intention. For within a short time of their promotion the businesses of the six companies were prosperous beyond all expectation. In the year 1931 their combined profits were £57,780, in 1932 £128,525 and in 1933 £344,671. It is not surprising that in the light of this great success the deceased and his co-adventurer, Meyer, should form a public company to acquire all the shares of all the six companies. This they did. The Ideal Building and Land Development Co. Ld. was formed to acquire the shares, and, the deceased having in the meantime procured the execution by the appellants of two powers of attorney dated May 2, 1934, authorizing him to deal with their shares and any dividends thereon in the most general terms, an agreement was entered into between the new company and the several shareholders of the six private companies for the sale of all the shares for £700,000, of which £300,000 was to be satisfied in cash and £400,000 in shares of the new company. The appellants signed this agreement and under it became entitled, Richard to £45,937 10s. in cash and £40,000 in shares, and Winifred to £26,737 10s. in cash and £40,000 in shares. It is an undisputed and from one point of view a material fact that the appellants signed these documents at the request of the deceased without understanding what they were doing. The deceased received the cash consideration for the appellants' shares in the old companies and he at various times sold, and received the proceeds of sale of, their shares in the new company. He subsequently placed to the credit of the appellants respectively in separate deposit accounts with Barclays Bank Ld. (after allowing for two payments which can be identified) the exact amount of the cash consideration for the old shares and round sums in each case equivalent with trifling differences to the proceeds of sale of the new shares. At some date, which is uncertain, as the document is undated, but fell between May 16 and September 5, 1934, the deceased obtained the appellants' signatures to documents authorizing him to withdraw moneys from their deposit accounts. Of the contents of these documents also the appellants were ignorant. But the deceased, without their knowledge, acted upon them and drew on the accounts, which were by the end of the year 1936 exhausted. It is not disputed that some part of the sums so withdrawn was paid to or otherwise dealt with for the benefit of the appellants respectively, but a large part remains unaccounted for. Hence this suit, in which in effect the appellants claim an account of the proceeds of their original shares and other appropriate relief.

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[2] (1818) 1 Swanst. 13, 19.

I have omitted to state one fact subsequent to the original transaction which, whether or not it is to be regarded as part of it and admissible in evidence under that head, is clearly admissible as an admission by the deceased against interest. Shortly before the completion of the agreement with the new company and no doubt as part of the arrangement, one of the old companies, New Ideal Homesteads Ld., declared and paid a dividend of £25 12s. per share. The deceased, acting presumably under the power of attorney to which I have referred, received the dividend attributable to the appellants' shares and, though retaining it for his own use, instructed the respondent Dunk, an accountant who acted for the deceased in the preparation of his income tax returns, that the dividend was the income of the appellants. It was so treated by Dunk, whose integrity has not been challenged. Similar information and instructions were given by the deceased to Dunk in regard to the sums placed to the deposit account of the appellants with Barclays Bank Ld. and to the untaxed interest payable in respect of those sums, and were acted on by him.

I turn, then, again to ask how these facts which I have briefly narrated can be adduced in evidence by the deceased or his estate. And I think it convenient at this stage to refer to a matter in which, with great respect, I think the Master of the Rolls fell into an error and, moreover, into an error which largely influenced him in the conclusion to which he came. For he treated the appellants' claim merely as a claim against a dead man's estate, and therefore (as he says and reiterates) as a claim in which a heavy onus lay on the claimants. But that is not, in my opinion, the way in which the claim should be regarded. It starts with the fact that in 1929 certain shares were placed by their father in the names of the appellants, and, that fact being admitted or proved, a presumption at once arises which it is for the respondents to rebut. They as executors are in no stronger position than their testator would be in if he were alive.

My Lords, at the outset of this opinion I said that there must often be room for argument whether subsequent events can be regarded as forming part of the original transaction so as to be admissible evidence of intention, and in this case it has certainly been vigorously argued that they can. But, though I know of

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no universal criterion by which a link can for this purpose be established between one event and another, here I see insuperable difficulty in finding any link at all. The time factor alone of nearly five years is almost decisive, but, apart from that, the events of 1934 and 1935, whether taken singly or in their sum, appear to me to be wholly independent of the original transaction. It is in fact fair to say that, so far from flowing naturally and inevitably from it, they probably never would have happened but for the phenomenal success of the enterprise. Nor can I give any weight to the argument much pressed upon us that the deceased was an honourable man and therefore could not have acted as he did, if he had in 1929 intended to give the shares outright to his children. I assume that he was an honourable man as well in the directions in regard to income tax that he gave to Mr. Dunk as otherwise, but I think that he may well have deemed it consistent with honourable conduct and with paternal benevolence to take back part of what he had given when the magnitude of the gift so far surpassed his expectation.

If, then, these events cannot be admitted in evidence as part of the original transaction, can they be admitted to rebut the presumption on the ground that they are admissions by the appellants against interest? I conceive it possible, and this view is supported by authority, that there might be such a course of conduct by a child after a presumed advancement as to constitute an admission by him of his parent's original intention, though such evidence should be regarded jealously. But it appears to me to be an indispensable condition of such conduct being admissible that it should be performed with knowledge of the material facts. In the present case the undisputed fact that the appellants under their father's guidance did what they were told without inquiry or knowledge precludes the admission in evidence of their conduct and, if it were admitted, would deprive it of all probative value. It is otherwise, however, with the conduct of the deceased. I have already made it clear that the respondents have failed to discharge the burden which rests on them of rebutting the presumption of advancement. The appellants, therefore, in my opinion, need no reinforcement from subsequent events. But, since inevitably in a complex case like this, either upon the footing of being examined de bene esse or because they have been admitted for some other purpose than the proof of intention, all the facts relevant or irrelevant have been reviewed, I do not hesitate to say that the only conclusion which I can form about the deceased's original intention is that he meant the provision he then made for his children to be for their permanent advancement. He may well have changed his mind at a later date, but it was too late. He may have thought that, having made an absolute gift, he could yet revoke it. This is something that no one will ever know. The presumption which the law makes is not to be thus rebutted. If it were my duty to speculate upon these matters, my final question would be why the deceased should have put these several parcels of shares in six different companies into the names of his wife and three children unless he meant to make provision for them, and since counsel have not been able to suggest any, much less any plausible, reason why he should have done so, I shall conclude that the intention which the law imputes to him was in fact his intention. The reasoning which made so strong an appeal to Mellish L.J. in *Fowkes* v. *Pascoe* [3] has in this case also particular weight.

In my opinion, then, this appeal succeeds on the main question that has been argued before us. But two further points were urged upon which I must say a few words. It was contended by counsel for the respondents that, as the appellants did not know that the shares had been registered in their names, there could have been no gift of the shares to them, since there cannot be a gift without acceptance by the donee, and the well-known case of *Cochrane* v. *Moore* [4] was cited to support this contention. My Lords, I have some difficulty in understanding the application of *Cochrane* v. *Moore* [4] to the present case. There the law was expounded with a wealth of learning how a gift of a chattel can be lawfully made. Here the legal estate in the shares was vested in the appellants in the only way in which it could be vested, and the only question is whether the beneficial interest attended the legal interest by virtue of the equitable doctrine of advancement or whether there was a resulting trust. That is the question which I have tried to answer.

Lastly, the respondents raised the plea of the Limitation Act, 1939. To this, I think, a complete and satisfactory answer is given in the judgment of Denning L.J. which, upon this part of the case, I respectfully adopt. It was conceded by the respondents that the deceased received the consideration in cash and shares for the appellants' shares as trustee for them, and it is clear that he could not discharge himself of that trust by purporting to act in some other capacity in a manner and in circumstances unknown to them.

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[3] (1875) L.R. 10 Ch. 343.

[4] (1890) 25 Q.B.D. 57; 6 T.L.R. 296.

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I move accordingly that this appeal be allowed and that the following order be made:—(I) That the order of the Court of Appeal of July 1, 1953, be set aside. (II) That the judgment of Harman J. of February 19, 1953, be varied as follows: "(i) By "declaring (in lieu of the declaration on inquiry No. 5 ordered "by order dated January 12, 1953) that all the shares in the "companies there mentioned, registered in the respective names "of the appellants, were advancements to them respectively, so "as to constitute each the sole beneficial owner thereof, and that "their respective claims against the estate of the testator based "upon such beneficial ownership are not barred by laches or "acquiescence, or by the Limitation Acts, 1623 or 1939. (ii) By "striking out the declarations on inquiries Nos. 7 and 10 (ordered "by the said order dated January 12, 1953). (iii) By declaring "that the accounts and inquiries Nos. 6, 7, 9, 10 and 11 set out "in the order of Harman J. dated January 12, 1953, should be "taken and made upon the basis of declaration (i) above."

The respondents Joseph Osmond Cartwright and Hedley Spain Dunk will retain their costs as between solicitor and client out of the estate of the deceased in due course of administration. The appellants will be paid their costs of this appeal and in the Court of Appeal out of the estate as between party and party. The respondent, Philip Edward Shephard, will bear his own costs of this appeal and in the Court of Appeal.

My noble and learned friend Lord Tucker, who is unable to be here today, has asked me to say that he agrees with the reasons and conclusions which I have come to.

LORD MORTON OF HENRYTON. My Lords, I entirely agree with the opinion which has just been delivered by my noble and learned friend Viscount Simonds, but as we are differing from the Court of Appeal and from Harman J. I shall add a few words on the question whether it is possible to find a "half-way house" between the view which my noble and learned friend has just expressed and the view that each of the appellants was a bare trustee for the deceased.

I shall first take the case of the appellant Richard David Shephard. In 1929, when Richard became the registered owner of shares in private companies promoted by his father and Meyer, he must have taken those shares either as beneficial owner or as a trustee. I see no third possibility which would be recognized by English law. If, however, the presumption of an advancement is rebutted, the evidence may establish either (a) that he took them as a bare trustee for his father, or (b) that he took them upon certain other defined trusts.

My Lords, I find the latter alternative quite impossible in the present case, even if all the events set out in the judgment of the Master of the Rolls are admitted in evidence. I cannot believe that Richard's father would select him, at the age of 16, to hold several separate blocks of shares as a trustee with duties to discharge and trusts to carry out. Further, it is clear that no trusts were communicated to Richard when the shares were taken up in his name or at any later date. Finally, even if these two obstacles could be surmounted, I should find it hard to formulate any trusts which explained the subsequent acts and words of the father in regard to these shares.

For these reasons, I think that there is no "half-way house," in Richard's case, and I think that these reasons apply equally to his sister, for although she was 23 years old in 1929 she would seem to have been quite inexperienced in business matters.

I have made these observations because the Master of the Rolls and Romer L.J. found a "half-way house," and I feel that, out of respect for them, I ought to explain briefly why I cannot enter it with them. I add that the case of *Devoy* v. *Devoy*,[5] on which they relied, does not, in my opinion, afford an instance of a "half-way house." To quote the language of the report: "The bill stated that on July 14, 1848, the plaintiff "transferred the sum of £200 three and a quarter per cent. "annuities (since converted into new three per cent. annuities) "into the joint names of himself, his wife, and his daughter "Amelia Jane Devoy (in which names the stock was now "standing), but the transfer note was signed by the plaintiff "alone. At the date of effecting such transfer the plaintiff, who "was a fellowship porter, was in easy circumstances, and his "motive for so doing was that he might not be induced to have "recourse to such stock except his necessities should compel him "so to do, but the stock should remain as a provision for the "future. The plaintiff, as the bill alleged, never intended to "give the said stock to his wife or daughter, or to both jointly, "or to the survivor of them, or to the survivor of the three "persons into whose names the transfer was made, or any part "thereof, or to declare any trust of the same or of any part "thereof, or to place it beyond his own control, and did not "know that the effect of transferring such stock into the said

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[5] (1857) 3 Sm. & G. 403.

"names would be to prevent him from availing himself of the "said stock in case of need, and had he known that such would "have been the effect he would not have made such transfer. "No trust was ever declared of the said stock; but the plaintiff "regularly received the dividends thereof, and applied the same "to his own use."

The plaintiff, having sustained injuries which prevented him from following his calling as a fellowship porter, applied to the bank to transfer the stock into his name or to permit him to sell the same, but met with a refusal.

Thus, my Lords, the allegation was, in effect, that the plaintiff always intended to retain the beneficial interest in the stock, but to remove, to some extent, the temptation to have recourse to it unless he should be forced to do so by necessity. The Vice-Chancellor's decision was in the following terms[6]: "Declare that the infant defendant is a trustee for the father, "and the order will be in the form prescribed by the Trustee "Relief (Extension) Act."

The wife was also a defendant, but it seems likely that her name was omitted from the decree because she was willing to join in a transfer. Whatever the explanation may be for the omission of her name, it would seem clear that the Vice-Chancellor accepted the plaintiff's contention that he was the sole beneficial owner. In his judgment, however, the following sentence occurs[7]: "Here the evidence shows that the father intended to confer only "a qualified interest and not to make an absolute gift."

My Lords, I confess I am unable to understand what was the "qualified interest" which the Vice-Chancellor had in mind. It may be that he was referring only to the legal estate, for neither the evidence nor the decision contains the slightest indication that any other interest was intended to be conferred either on the wife or on the daughter. I regard the case of *Devoy* v. *Devoy*[8] as being simply a case in which the presumption of advancement was rebutted and the court was satisfied that the persons in whose names the investment stood were bare trustees for the plaintiff.

I agree with the order proposed.

LORD REID. My Lords, I agree and, even if all the evidence in this case is taken into consideration, I am of opinion that the appellants must still succeed. I take first the other transactions which are said to show a course of conduct. The argument for the respondents is that in these cases the father put the titles to various properties in his children's names intending to retain for himself the beneficial interest and therefore it can be more readily established that he intended to retain the beneficial interest in the shares in question in this case. But the basis of that argument is that he in fact retained the beneficial interest in the other properties and that has not been proved. The first instance is a business of insurance broking, R. D. and P. E. Shephard, which the father started about 1916, the only registered partners being the two appellants, who were then only ten and three years old. No doubt he had a reason for using their names, because the terms of his employment with an insurance company forbade him to carry on such a business; but for a time at least he caused the profits of this business to be returned for income tax purposes as income of the appellants. The circumstances of this case are so special that I could draw no inference from them.

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[6] 3 Sm. & G. 403, 406.
[7] Ibid. 405–6.
[8] 3 Sm. & G. 403.

Then the father acquired two businesses, one of which was carried on in the name of the appellant Mrs. Cartwright and the other in the name of the other appellant. Neither appellant was told of this, but, again, the results of these businesses were shown in the children's income tax returns by the father's direction. Here there were losses, and those losses were ultimately paid out of the price which the father received for the shares in the names of the children with which this case is concerned.

The father also took the titles of a number of houses in the children's names. The children were told of this at later dates and it is admitted that these were gifts, but it was argued that where in contrast the children were not told no gift was intended. I am not sure whether it was maintained that the father intended to retain the beneficial interest in each case until he told the children, but there is nothing to support that view.

The true position of the three businesses to which I referred is far from clear, and even if it were clearer there are obvious differences between fully paid shares registered in the children's names and businesses carried on by the father under their names. This seems to me to be a very good example of the wisdom of the rule which excludes such evidence.

I turn to the shares with which this case is concerned. In 1929 the father and one Meyer, an undischarged bankrupt, promoted six private companies to be used in the business of speculative building. In aggregate the father registered 725 £1 shares in his own name, 100 in the name of his wife, 425 in the name of his daughter Winifred (now Mrs. Cartwright), 875 in the name of the appellant Richard, and 375 in the name of another son Philip, making 2,500 in all. We do not know whether the wife or Philip was told about this, but the appellants were not told. There is no contemporary evidence of any kind to show what the father's intention was with regard to the shares registered in the appellants' names, and no dividend was declared until 1934. A substantial dividend was then declared, and the father instructed his accountant to show the dividend on the shares in the appellants' names as belonging to them and as their income. But they did not receive the income. There is no evidence to prove or suggest that the father was at any stage causing false returns to be made or trying to defraud the Revenue.

The respondents rely on the father's actions in 1934 and subsequent years in selling the shares and disposing of the proceeds. It appears that he was in the habit of getting his children to sign numerous documents without telling them anything about the nature of the documents, and the appellants were quite willing to do this. The companies were controlled by the father and Meyer and in 1934 they agreed to sell all the shares for a very large sum: the consideration received for the 2,500 shares in the names of the father and his family was £145,000 in cash and a large number of shares in the purchasing company. The agreement to sell bears the appellants' signatures, but they were never told what they were signing and did not even know that they were shareholders. The father first put the whole price into the bank in his own name, but after a short time opened deposit accounts in the names of each of the appellants and paid into each account the share of the £145,000 appropriate to the number of shares registered in each of the appellants' names less comparatively small sums which appear at least in one case to have been used to pay losses in businesses carried on in the children's names. The father also paid into these accounts sums received when shares in the new company allotted to the appellants were sold by him. He obtained the appellants' signatures to documents authorizing him to draw on these accounts—again without telling them what these documents were. Ultimately he used most of the money in these accounts for his own purposes: but he put about £40,000 in the name of each of the appellants and admittedly these sums belonged to the appellants.

Such in outline are the facts on which the respondents rely. The appellants agree that their father was an honourable man, and the respondents say that no honourable man would have done this if he had originally intended the children to be the beneficial owners of the shares which he registered in their names in 1929. At first sight that seems a formidable argument, but on examination I do not find it at all convincing.

The father was not a lawyer. He may quite well have thought that as he had never told the appellants anything, he was entitled—morally or perhaps legally—to take back what he had given: and he may have thought that £40,000 for each of them was a very good substitute for what he had first given—shares of a nominal value of a few hundred pounds. He may have intended to make gifts reserving a power to revoke them, or he may have thought that it was unnecessary to trouble about the legal position because he believed that his children would sign anything he put before them and he could thus make any changes which he thought desirable. But I find it very difficult to suppose that he never intended the children to be the owners of the shares. I cannot imagine any reason why he should put the shares in his children's names unless he intended at least that if he died before making any alteration the shares should belong to them and not to his estate. Certainly there is nothing in the evidence which is in the least inconsistent with such an intention.

It is for the respondents to displace the presumption that in registering the shares in the appellants' names he intended to make them beneficial owners. Unless his statement to the Revenue that the dividends belonged to them and were part of their incomes was fraudulent he must have intended that they should have some beneficial rights, and in my judgment the most that could be inferred in the respondents' favour is that he thought he was morally entitled to do what he did. Whether he thought he had reserved a power to take back the shares, or relied on his children being willing to sign without explanation any documents necessary to enable him to deal with the shares or their proceeds in any way he thought fair is a question which on the evidence cannot be answered. So it appears to me that on the facts of this case the respondents are not at all prejudiced by the operation of rules of law which exclude much of the evidence.

LORD SOMERVELL OF HARROW. My Lords, I agree.

Appeal allowed.

Solicitors: *Douglas & Co.; MacDonnell & Co.; Sidney Pearlman.*

J. C.*
1955
Mar. 14.

ATTORNEY-GENERAL FOR NEW SOUTH WALES . . . . APPELLANT;

AND

PERPETUAL TRUSTEE CO. (LD.) AND OTHERS RESPONDENTS.

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

Australia (New South Wales)—Master and servant—Per quod servitium amisit, action—Police constable—Injury by accident—Crown's claim for loss of services—Action per quod servitium amisit not maintainable—Status of constable by statute and at common law—Holder of public office—Not ordinary servant and master relationship—Police Regulation Act, 1899–1947, *of New South Wales.*
Master and Servant. Police—Constable—Status.

The action per quod servitium amisit does not lie at the suit of the Government of New South Wales for the loss of the services, by reason of the tortious act of a wrongdoer, of a police constable appointed under the Police Regulation Act, 1899–1947, of New South Wales.

There is a fundamental difference between the domestic relation of servant and master, upon which the action per quod servitium amisit rests, and that of the holder of a public office and the State which he is said to serve. The constable falls within the latter category. His authority is original, not delegated, and is exercised at his own discretion by virtue of his office: he is a ministerial officer exercising statutory rights independently of contract. His relationship to the Government is not in ordinary parlance described as that of servant and master. The action per quod servitium amisit appears to be a survival from the time when service was a status, and that status lay in the realm of domestic relations. It would not be in accord with modern notions or with the realities of human relationships today to extend the action to the loss of service of one who, if he can be called a servant at all, is the holder of an office which has for centuries been regarded as a public office.

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* *Present*: VISCOUNT SIMONDS, LORD MORTON OF HENRYTON, LORD RADCLIFFE, LORD COHEN, and LORD SOMERVELL OF HARROW.

The Commonwealth v. *Quince* (1944) 68 C.L.R. 227 approved. The case of a police constable is not in principle distinguishable from that of a soldier.

Bradford Corporation v. *Webster* [1920] 2 K.B. 135; 36 T.L.R. 286 and *Attorney-General* v. *Valle-Jones* [1935] 2 K.B. 209; 51 T.L.R. 239, in which the only question was the measure of damages, explained.

Rex v. *Richardson* [1948] S.C.R.(Can.) 57; *United States* v. *Standard Oil Co. of California* (1947) 332 U.S. 301; and dictum of Lord Sumner in *Admiralty Commissioners* v. *S.S. Amerika* [1917] A.C. 38, 60; 33 T.L.R. 135 considered.

Attorney-General and Minister for Justice v. *Dublin United Tramways Co. Ld.* [1939] I.R. 590 disapproved.

Judgment of the High Court of Australia (1952) 85 C.L.R. 237 affirmed.

APPEAL (No. 20 of 1954) from a majority judgment of the High Court of Australia (March 5, 1952) affirming a judgment of the Supreme Court of New South Wales (March 9, 1951) in favour of the respondents on a demurrer to an information which on behalf of the Crown claimed damages for the loss of services of a policeman by the alleged negligent driving of a motor-vehicle by one of the respondents.

The following facts and statutory provisions are taken from the judgment of the Judicial Committee: The suit out of which the appeal arose was commenced by the Attorney-General for New South Wales by information dated June 30, 1950, filed in the Supreme Court of New South Wales. In that information it was alleged on behalf of the Crown that the first and second respondents were executors of the will of Frederick James Johnson, deceased, and as such the owners of a certain motor-vehicle, that the vehicle was being driven on a public highway by the fourth respondent as agent of the third respondent, and that one Bertrand Leslie Hayden, a member of the police force of New South Wales, was passing along the highway in a tram car when the motor-vehicle was negligently driven against the tram car whereby Hayden received bodily injury disabling him from the performance of his duties as a member of the police force. The information further alleged that during his period of disability and whilst he continued as a member of the police force Hayden was paid the salary and allowances appropriate to his office although the Crown was during the same period deprived of his services as a member of such police force, and that upon his discharge Hayden was paid, and had since been paid and would continue to be paid, a pension in accordance with the provisions of Police Regulation (Superannuation) Acts, 1906 to 1944, whereas but for such disablement he would not have commenced to receive a pension in accordance with the provisions of the said Acts for a long time. The Attorney-General claimed on behalf of the Crown to recover the salary and allowances paid as aforesaid and to be reimbursed in respect of the moneys already paid and which would thereafter be paid to Hayden pursuant to the said Acts. The amount of the Attorney-General's claim was expressed to be £5,050 3s. 9d.

On September 13, 1950, the respondents delivered a defence pleading the general issue and denying the allegations contained in the information. In addition, the respondents demurred to the information in the following terms:

"And the defendants and each of them further say that the "declaration herein is bad in substance.

"On the argument of this demurrer it will be contended that "the said declaration is bad in substance on the following amongst "other grounds: (1) That it discloses no cause of action. (2) That "the action per quod servitium amisit does not lie at the suit "of the Crown for the loss of the services of a member of the "police force."

On September 25, 1950, the Attorney-General filed a joinder in demurrer and a replication joining issue on the respondents' pleas. The case was set down and argued on the defendants' demurrer on February 13, 1951.

On March 9, 1951, the Supreme Court of New South Wales (Street C.J., Maxwell and Owen JJ.) gave judgment on the demurrer in favour of the respondents. Street C.J. held that the case was completely covered by the decision of the High Court of Australia in *The Commonwealth* v. *Quince*,[1] in which case it was decided that an action would not lie at the suit of the Crown in respect of the loss of the services of a member of the Royal Air Force as a result of injuries sustained by him owing to the negligent driving of the respondent. The other judges of the Supreme Court concurred and gave further reasons for holding that the action would not lie.

On appeal to the High Court the judges of that court dismissed the appeal by a majority (Dixon C.J., McTiernan, Webb, Fullagar and Kitto JJ., dissentiente Williams J.), but Dixon C.J. said that he felt constrained to follow the decision in *Quince's* case [1] and that, had the matter been res integra, he would have held that the action was maintainable.

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[1] (1944) 68 C.L.R. 227.

The relevant provisions of the Police Regulation Act, 1899–1947, of New South Wales, on which reliance was placed by both parties, were the following sections:

"4.—(1) The Governor may from time to time appoint a "Commissioner of Police who shall, subject to the direction of "the Minister, be charged with the superintendence of the police "force of New South Wales.

"(4) The Commissioner may be suspended or removed from "his office for misbehaviour or incompetence as follows: (*a*) The "Commissioner may be suspended from his office by the Governor "for misbehaviour or incompetence, but shall not be removed "from office except as hereinafter provided. The Minister shall "cause to be laid before Parliament a full statement of the "grounds of suspension within seven sitting days after such suspension if Parliament is in session, and if not, then within "seven sitting days after the commencement of the next session; "(*b*) the Commissioner suspended under this section shall be "restored to office unless each House of Parliament within "twenty-one days from the time when such statement has been "laid before it, declares by resolution that the Commissioner "ought to be removed from office, and if each House of Parliament within the said time does so declare, the Commissioner "shall be removed by the Governor accordingly.

"4A.—(1) The Governor may from time to time appoint a "Deputy Commissioner of Police who shall assist the Commissioner generally in the superintendence of the police force of "New South Wales.

"5.—(1) The Governor may appoint such number of superintendents and inspectors of police as may be found necessary.

"6.—(1) The Commissioner may, subject to disallowance by "the Governor, appoint so many sergeants and constables of "police of different grades as he deems necessary for the "preservation of the peace throughout New South Wales.

"(2) Such constables shall, unless and until their appointments repectively are disallowed by the Governor, have all such "powers, privileges, and advantages and be liable to all such duties "and responsibility as any constable duly appointed now has or

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[1] (1944) 68 C.L.R. 227.

" hereafter may have either by the common law or by virtue of " any statute or Act of Council now or hereafter in force in " New South Wales.

" 9. No person appointed to be a member of the police force " shall be capable of holding such office or of acting in any way " therein until he has taken and subscribed the following oath:— " I, A.B., do swear that I will well and truly serve our Sovereign " Lady the Queen in the office of Commissioner, superintendent, " inspector, sergeant, or constable of police (as the case may be), " without favour or affection, malice or ill-will, for the period " of . . . from this date, and until I am legally discharged, that " I will see and cause Her Majesty's peace to be kept and " preserved, and that I will prevent to the best of my power all " offences against the same, and that while I continue to hold " the said office I will to the best of my skill and knowledge " discharge all the duties thereof faithfully according to law. " So help me God. Such oath shall be administered by a " Justice, and shall in all cases be subscribed by the person taking " the same, and when so taken and subscribed shall be forwarded " to the Commissioner by the Justice before whom the same was " taken.

" 10. Every person taking and subscribing such oath shall be " deemed to have thereby entered into a written agreement with " and shall be thereby bound to serve Her Majesty as a member " of the police force and in the capacity in which he has taken " such oath, at the current rate of pay for such member, and " from the day on which such oath has been taken and subscribed " until legally discharged: Provided that—(*a*) no such agreement " shall be set aside, cancelled, or annulled for want of reciprocity; " (*b*) such agreement may be cancelled at any time by the lawful " discharge, dismissal, or other removal from office of any such " person, or by the resignation of any such person accepted by the " Commissioner or other person acting in his stead. . . .

" 12. The Governor may make rules for the general government " and discipline of the members of the police force and to give " effect to this Act or any amendment thereof. . . .

" 18.—(1) No member of the police force shall be at liberty to " resign his office or to withdraw from the duties thereof unless " expressly authorized in writing so to do by the Commissioner or " other member of the police force under whom he is placed, or " unless he gives to such member of the police force three months' " notice of his intention so to resign or withdraw.

" (2) Any member of the police force who so resigns or

" withdraws without such previous permission or notice shall, on " conviction before two Justices, be liable to a penalty not " exceeding twenty pounds.

" 19.—(1) When any member of the police force is dismissed " from or ceases to hold his office, all powers and authorities " vested in him shall immediately cease.

" 27. Nothing in this Act contained shall be deemed to " diminish the duties or restrict or affect the liabilities of constables at common law, or under any Act now in force or " hereafter to be passed."

1955. Jan. 24, 25, 26, 27, 31; Feb. 1, 2. *Frank Gahan Q.C.* and *J. G. Le Quesne* for the appellant. The case raises four questions: (1) the nature of the action for loss of services; (2) the position of the Crown as a master or employer; (3) the special position of a police constable, and whether in that special position he is either within the scope of the action or whether the term master is used in connexion with him; and (4) in a minor degree, the question of damages—were they too remote to be recovered? The Supreme Court of New South Wales was bound by the decision in *The Commonwealth* v. *Quince*,[2] in which it was held that an action would not lie at the suit of the Crown for the loss of the services of a member of the Royal Air Force who was injured by the negligent driving of the respondent. Unless, therefore, the Crown could establish a distinction that court had to follow *Quince's* case.[2]

At the outset the following cases dealing with the position of employees or of police officers may be of assistance if referred to before the judgments of the courts below in the present case are read: *Stanbury* v. *Exeter Corporation*,[3] *Enever* v. *The King*,[4] *Brandy* v. *Owners of S.S. Raphael*,[5] *Admiralty Commissioners* v. *S.S. Amerika*,[6] *Bradford Corporation* v. *Webster*,[7] *Fisher* v. *Oldham Corporation*,[8] *Attorney-General* v. *Valle-Jones*,[9] *Attorney-General and Minister for Justice* v. *Dublin United Tramways Co. Ld.*,[10] *The Commonwealth* v. *Quince*,[11] *Rex* v. *Richardson*,[12] *United States* v. *Standard Oil Co. of California*[13] and *Receiver*

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[2] 68 C.L.R. 227.

[3] [1905] 2 K.B. 838; 22 T.L.R. 3.

[4] (1906) 3 C.L.R. 969, 975, 981.

[5] [1911] 1 K.B. 376; [1911] A.C. 413.

[6] [1917] A.C. 38, 43–4.

[7] [1920] 2 K.B. 135, 142; 36 T.L.R. 286.

[8] [1930] 2 K.B. 364, 369–74; 46 T.L.R. 390.

[9] [1935] 2 K.B. 209; 51 T.L.R. 239.

[10] [1939] I.R. 590, 595.

[11] 68 C.L.R. 227.

[12] [1948] S.C.R.(Can.) 57, 61.

[13] (1947) 332 U.S. 301, 311.

for the Metropolitan Police District v. *Tatum.*[14] [The judgments of the courts below in the present case were then read.]

With regard to the first question—the nature of the action for loss of services—it is submitted that it is an action which is available wherever there is a relationship of master and servant; it is of general application: see *per* Coleridge J. in *Lumley* v. *Gye.*[15] Later authorities abolished any restriction, and the action was brought in trespass on the case, so that personal injuries from whatever cause are within the common law action. It was an action in trespass at common law; it was an action available to the master for injury to his servant, whereas the Statute of Labourers, 1350 (23 Edw. 3) for the first time brought in a right, where there was no physical injury or force used, to enforce the right to retain a labourer in one's employment. [*Taylor* v. *Neri* [16] was referred to.] The suggestion that the action is confined to the case of a menial servant is unsound: *Evans* v. *Walton* [17]; *Martinez* v. *Gerber.*[18] It is quite clear in all the cases that the proper allegation in the pleadings was one of master and servant, no more. If there had been a restriction to menial servants or to any other particular class of servant it would have been necessary under the old form of pleading to allege it. No one has sought to distinguish between one servant and another: *Mankin* v. *Scala Theodrome Co. Ld.*[19] If there is the relationship of master and servant in the relevant sense it does not matter that the servant is an important salaried servant or a menial one. The master is entitled to devise what machinery he likes for giving instructions to his servant, and exactly the same principle applies when there is a more elaborate chain of organization, until one comes to the organization of government, with ministries and all their instrumentalities.

On the point of there being no distinction between the class of servant, see also *Attorney-General* v. *Valle-Jones* [20]; the attempt to make any such distinction began and ended with *Taylor* v. *Neri.*[21] [Reference was also made to *Hall* v. *Hollander.*[22]] The position is correctly summarized in the judgment of Dixon J. in the present case [23]: " In the historical development of the actions " per quod servitium amisit there has not been any limitation upon

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[14] [1948] 2 K.B. 68; [1948] 1 All E.R. 612.

[15] (1853) 2 E. & B. 216, 246, 253, 258, 264–6.

[16] (1795) 1 Esp. 386.

[17] (1867) L.R. 2 C.P. 615, 620.

[18] (1841) 3 Man. & Gr. 88.

[19] [1947] K.B. 257, 260; 62 T.L.R. 728; [1946] 2 All E.R. 614.

[20] [1935] 2 K.B. 209.

[21] 1 Esp. 386.

[22] (1825) 4 B. & C. 660, 663.

[23] 85 C.L.R. 237, 248.

"the class of services for the loss of which a private employer "may sue. All that is required is that the relation of master "and servant shall exist. . . . To compare the medieval condi- "tions or conceptions in which the remedy of trespass per quod "servitium amisit arose with those affecting the service of the "Crown at the present time and to regard the very great difference "as bearing upon the question whether the remedy belongs to "the Crown for loss of the services of a soldier or policeman "or a public servant appears to me to be a mistaken form of "reasoning. The comparison should be between the relation to "the Crown of its servants from time to time and the corre- "sponding relation at the same respective times of a servant to "a master who is a subject. I venture to think that if this form "of comparison is made it will be found that at no stage in the "long course of legal development the law has undergone did "the relevant attributes of the relation between the servants of "the Crown and the Crown so differ from those of the relation "between the servants of a subject and their master as to take "a loss of services by the Crown in consequence of a wrongful "injury to its servant outside the scope of the remedy of trespass "or of case or the modern equivalent but innominate cause of "action accorded to a subject sustaining a loss of services by such "a wrongful injury to his servant." [Reference was also made to Halsbury's Laws of England, 2nd ed., vol. 22, pp. 251–3; Jenks' Digest of English Civil Law, 3rd ed., vol. 1, pp. 442–5; Salmond on the Law of Torts, 10th ed., p. 361; McDonell on Master and Servant, 2nd ed., p. 193, and to *Hartley* v. *Cummings* [24]—an inducement case.]

With regard to the second point—the position of the Crown as master—one starts from the general principle that where the subject has a right the Crown also has that right unless there is some special reason which puts the Crown in a different position. The Crown may not choose to enforce its rights in a great many cases, and it may therefore be that the Crown is found attempting to enforce ordinary rights only in cases where there is a principle of public importance to be established or tested in the courts. If the relationship between the Crown and the servant can be established, it would give exactly the same right as in the case of a private person. As was said in effect in *Attorney-General* v. *Valle-Jones*,[25] why should the Crown be in a different position? There is no reason for such an illogical position. The principle

[24] (1847) 5 C.B. 247.

[25] [1935] 2 K.B. 209.

of vicarious liability has been recognized in the case of the Crown, and an action can now be brought against the Crown in exactly the same way as it can be brought against a private person, and the test would be exactly the same. There are two complications, first, where persons are servants of the Crown in some special capacity, as in this case the police, but if the appellant here is right about police it does not matter whether there would be other classes to whom the argument would not apply. The other complication is the very elaborate system of government by which there are a number of ministers and subordinate officials and so on. There may be a great many intermediaries between the Crown and the servant who is injured, but it is submitted that that is machinery and does not affect the principle. Unless there is some special character in the police service there is vicarious liability. The test is what the master employs the servant to do. [Reference was made to Maitland's Constitutional History of England, p. 108, and to *Bainbridge* v. *Postmaster-General.*[26]]

On this aspect of the case it is submitted that, with the possible exception of the decision in *United States* v. *Standard Oil Co. of California*,[27] which turns on the special constitutional provisions, there is no suggestion in English law that the position of the Crown, if the relationship of master and servant be established, is any different from that of a private person, and it has the right to bring an action for loss of services.

With regard to the third point—the special position of a police constable—rule 2 of the rules made under the statutory authority of section 12 of the Police Regulation Act by the Governor-General provides that " The first duty of a member of the Force, " no matter what his rank, is to show proper respect for and to " give unquestioning obedience to the commands of his official " superiors, . . ."; and by rule 27: " Every member of the Force " will be presumed to know his duty in every case and, in the " absence of orders or instructions, will be held responsible for " the due performance thereof; and in case of failure or neglect " will be liable to punishment or dismissal." In all the circumstances he is clearly in a position which establishes him in the relation of servant to his master, the Crown. If he is a servant of the Crown with regard to any duty, then this action lay and there is a right to recover. It is not necessary for this appellant's purpose to say that *Enever's* case[28] was wrongly decided. A chain of intermediate officials makes no difference; all the duties of the constable's service can be regulated by superior orders; he is bound to obey those orders; he is deemed to have entered into a written agreement under which he has taken employment under the Crown in accordance with the Police Regulation Act. Every test which can possibly apply as to the nature of the work, the manner and time of his duties, is a test which ought to result in saying that this policeman is a servant of the Crown in the sense in which that term is used when one talks of the master's right to sue for loss of services. The position of a member of the armed forces may be somewhat different. It is submitted that *Quince's* case [29] was wrongly decided, and that *Attorney-General* v. *Valle-Jones* [30] is to be preferred.

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[26] [1906] 1 K.B. 178; 22 T.L.R. 70.
[27] 332 U.S. 301.
[28] 3 C.L.R. 969.

Viscount Hailsham Q.C. and *Dingle Foot Q.C.* for the respondents. This case can be approached in two ways. First, by considering only the rather narrow question whether action lies in respect of the loss of service of the police constable in New South Wales. Secondly, on the other hand, one can range a great deal further and go so far as to say that this case really gives one an opportunity of investigating a rare, obscure and difficult common law cause of action, and putting in a great number of authorities which do not lead to an absolutely conclusive result as they stand. One is bound to look at it from both points of view. To succeed here, the appellant must do one of two things. He can say, as he has said, that he admits that this type of action is confined to the strict relationship of master and servant, and the constable is a typical case of servant. Or he can say that he admits that a constable is not in any normal sense a servant, but that the action can be, and ought to be, extended by analogy to cover relationships which, although they are not strictly those of master and servant, are really so close and analogous to it that they must be treated for the purposes of this action in the same way. [*Quince's* case [31] was referred to.] For the respondents to succeed both those points of view must be met, and it is submitted, first, that a constable is not a servant in the strict sense of the word at common law or by statute, and, secondly, that this kind of action was never really intended to cover any relationship at all outside the strict relationship of master and servant.

It is an astonishing thing that counsel and sometimes judges of eminence in authority after authority should have allowed this fundamental point—whether the Crown could bring an action of this kind—to go without argument, and it is to that extent a point in the appellant's favour. But it is a point still more telling in the respondents' favour that nowhere until the period after the First World War does one find the Crown in this country attempting to bring an action of this kind for loss of services. It would certainly give rise to an extraordinary mass of litigation. [Reference was made to *Martinez* v. *Gerber*.[32]]

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[29] 68 C.L.R. 227.

[30] [1935] 2 K.B. 209.

[31] 68 C.L.R. 227, 238.

It is important to lay down at the outset that what passes for a single cause of action per quod servitium amisit has developed into three separate torts with different characteristics: (*a*) There is the action for inducing a breach of contract. Since *Lumley* v. *Gye* [33] that has been a separate cause of action: *Jones Brothers (Hunstanton) Ld.* v. *Stevens*.[34] (*b*) The action for seduction—injury for loss of the services of a female servant rendered pregnant by the defendant. Status for the purpose of seduction was essential; contract was immaterial, and knowledge was immaterial. (*c*) The action for tortious physical injury to a servant resulting in loss of service. That is the one which is now really being discussed. It is the original one; it arises outside the status; knowledge is immaterial. Damages are limited to the actual loss, and for the action to lie the act must be tortious as against the servant. Those are the three torts which have arisen, and they are dealt with quite separately in the books. The action for seduction is dealt with in Salmond on Torts, 11th ed., p. 402, section 117; for tortious physical injury, p. 406, section 118; and for inducing a breach of contract, p. 408, section 119. Until the date of *Lumley* v. *Gye*,[35] which is of great importance in the history of this tort, it had been supposed, wrongly, that the action for inducing a breach of contract was limited to cases of master and servant, and the decision in that case establishes that it is a separate tort, as it has since become.

No one ever suggested, it is submitted, that the action would ever have lain except in cases where the status of servitus arose either by virtue of the voluntary servitude to which the Statute of Labourers applied, or alternatively, when the family relationship which arose gave rise to the action of seduction in the case of a child, or the rather parallel action per quod servitium amisit in the case of a wife.

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[32] 3 Man. & Gr. 88.
[33] 2 E. & B. 216.
[34] [1954] 3 W.L.R. 953.
[35] 2 E. & B. 216.

It appears that the real distinction between menial and domestic servants and a labourer is in the term of hiring—the labourer was only hired for the day or week. Blackstone's Commentaries, Bk. I, Ch. 14, p. 422, shows perfectly plainly that in Blackstone's day an action per quod servitium amisit was limited to domestics—the word used to define menial servants in his first class. It did not extend to the fourth class. There is a second Statute of Labourers referred to in Stephen's History of the Criminal Law (1883 ed.), vol. 3, pp. 203 et seq. and p. 267. The importance of the Statutes of Labourers and other Acts is that they did contain a direct reference to servants, and one which may be considered not irrelevant to the present inquiry.

Lambard on Constables (1614 ed.), written at a time when villeinage was obsolete, shows that one of the rather striking features of the law then was the practice which the constable had of vouching for the freedom, the availability, of servants to take new employment—and, indeed, he charged 1d. for it every time. Lambard's book never once refers to a constable as a servant, although he uses the word "servant," and his silence is, it is submitted, most significant. The phrase is "inferior ministers "of the King's Majesty's peace": sections 35 and 36. A servant is a person who is hired for a period of time exceeding a week. In *Jones Brothers (Hunstanton) Ld.* v. *Stevens*,[36] and apparently without reference to Coleridge J. in *Lumley* v. *Gye*,[37] Lord Goddard C.J. points out that the whole action per quod servitium amisit has a definite historical relationship with the Statute of Labourers, which, it is submitted, never extended to cover a constable. *Davies* v. *Lord Berwick*,[38] although on another statute, is in point here: in the context of that case "servant" excluded even stewards; it is as near a decision as one can get; it uses the words "servant" and "husbandry" at a time when the Statute of Labourers was still in force.

The law has never recognized a proprietary interest in the master in any type of servant, other than restricted types. One has to look at the contract to see whether it gives rise to the type of service in respect of which the action could have arisen at any time. For the strict necessity of this argument all that need be submitted is that when the Statute of Labourers was abolished in 1863 the action disappeared, except for inducing and in the case of parent and child, where the relationship of servitium still exists. The submission is that the action never lay except in respect of the servants of class 1 of Blackstone; and if that is too narrow, it never lay in respect of classes 1 to 3 inclusive. In *Lumley* v. *Gye*[39] Coleridge J., although he was wrong in his minority decision, said that the action per quod servitium amisit as such has never lain except in cases where it lay under the Statute of Labourers. Nobody has ever questioned that he was right about that. In all three of the torts enumerated earlier the word "servant" must bear the same meaning.

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[36] [1954] 3 W.L.R. 953, 957–8.

[37] 2 E. & B. 216.

[38] (1861) 3 E. & E. 549, 554.

The first proposition is that although the word "servant" is used in relation to the action per quod servitium amisit, the word is always in fact limited to the meaning expressed in the Statute of Labourers, either (a) because the action only arose out of the statute, or (b) because at the time when the statute was passed the only persons to whom either the action or the expression "servant" applied were persons of this limited class. The Statute of Labourers in any event operated to perpetuate in this context the limited meaning of that expression, even if in other contexts the expression was beginning to extend its meaning. The second proposition is that the action is commonly agreed to have arisen out of the quasi-proprietary interest which the master is supposed to have enjoyed in the servant's services. The only class of persons in whose services any master can be shown to have any such quasi-proprietary interests, apart from family relationships, are servants in the limited sense above referred to. Thirdly, servants in the limited class referred to either (a) include only servants of the first category referred to by Blackstone, or (b) did not extend beyond the first three categories he referred to. Fourthly, the effect of the repeal of the Statute of Labourers is either (a) to abolish any proprietary interests owned by a master in the services of his servant, and thus to abolish the action except in the case of family relationship, or (b) the effect of the repeal must be irrelevant to the present action. The effect of the repeal can in no circumstances operate to extend the meaning of servant in relation to the action to include classes of servants to whom the action did not previously apply. For the way in which the meaning of "servants" shifts in different contexts, see *Gordon* v. *Jennings*.[40] There is a variety of different meanings of "servant" outside the context of this action per quod servitium amisit, the exact shade of which must be determined by the contexts in which it is used: *University of London Press Ld.* v. *University Tutorial Press Ld.*[41]

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[39] 2 E. & B. 216, 253, 260.

[40] (1882) 9 Q.B.D. 45, 46.

For the doctrine of vicarious responsibility the right to give orders and the right and duty of control extends far beyond any relationship which could reasonably be described as that of master and servant for the purposes of the action per quod servitium amisit. [Reference was made to *Samson* v. *Aitchison.*[42]] The test of vicarious responsibility is right to control, to give orders to the servant. It is a wholly erroneous test in relation to the action per quod servitium amisit. It does not follow that because there is the element of control the action applies—it is disputed that where there is the relationship of control there is the relationship of master and servant—it is begging the question—though the opposite is correct. *Parker* v. *Miller*[43] and *Ormrod* v. *Crosville Motor Services Ld., Murphie, Third Party*[44] establish that the test of control is indeed the test applied to vicarious responsibility, but vicarious responsibility has nothing to do with the question now under discussion.

Turning to the particular contract and the particular tests which are relied on to create the relationship of master and servant here, reference may first be made to the Canadian Act of 1943, passed in consequence of the decision in *McArthur* v. *The King*,[45] which provided that a member of the armed forces in Canada should be deemed to be a servant of the Crown, and in *Rex* v. *Richardson*[46] the Supreme Court of Canada held that under that Act an action lay at the suit of the Crown for damages for the loss of service of a member of the forces owing to the tortious act of the defendant. In view of that statute it would have been difficult for the Supreme Court to have come to any other conclusion; but it is as different as it can be from the section under consideration in the present case. If a constable, apart from the terms of section 10 of the Police Regulation Act, is a servant, then the respondents fail and the contract is one of service. But if the status of a constable apart from section 10 is not that of a servant, then this is not a contract of service because it is only a contract to serve Her Majesty as a constable. In fact the position of a constable is set down in section 6 (2). They did not change the nature of the police by this statute; they simply provided his pay and allowances. [Reference was also made to Halsbury's Laws of England, 2nd ed., vol. 25, pp. 288 and 320, and note (*m*) on p. 321.]

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[41] [1916] 2 Ch. 601, 611; 32 T.L.R. 698.

[42] [1912] A.C. 844; 28 T.L.R. 559.

[43] (1926) 42 T.L.R. 408.

[44] [1953] 1 W.L.R. 409.

[45] [1943] 3 D.L.R. 225.

[46] [1948] S.C.R. 57.

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1955

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It is a characteristic mark of a free society that the police force is not a servant of the executive, and never has been. They are not here creating a new kind of servant, but appointing people to one of the two or three oldest public offices in this country. An historical survey of the predecessors of the modern constable shows that they were free men, never servants; they swore an oath and performed an office under the Crown: see the 1677 High Constable's oath and that of the petty constable; they are not very different either in form or in substance from the oath laid down in the Police Regulation Act of New South Wales. The oath is the mark of a free man and not of a servant. There is nothing in common between the position of a constable and that of master and servant. His duties are not servile but of a high responsibility, originating in his own discretion: see Blackstone's Commentaries Bk. I, Ch. 9, p. 338—" jurisdiction and authority " are strange words to find in relation to servants.

The action for damages for loss of services due to physical injury, whether for the wife or child or servant, is to some extent an anomaly. Unless the matter has been extended the law will not extend it further. It has never been extended beyond the ambit of the Statute of Labourers. There cannot be found in the books anyone of managerial position of any kind who is covered by it. *Martinez* v. *Gerber*[47] is the worst case against the respondents on this point. Anybody who takes orders need not necessarily be a servant: Prison Rules, 1949 (S.I. No. 1073), rr. 42, 56. There can be people under the strictest form of discipline without them being in any way a servant. [Reference was made to Viner's Abridgment, 1792 ed., p. 427, under the head " Constable," to Bacon's Abridgment, vol. 2, p. 166, and to the opening lines of Shakespeare's " Much Ado About Nothing," Act 3, Scene 3.] Those who take orders are not necessarily servants; and secondly, a policeman may take orders, but he does not take orders from the Crown, and is not therefore the Crown's servant: Halsbury's Laws of England, 2nd ed., vol. 6, p. 494. The hierarchy stops short at the commissioner; it does not go on to the government. In New South Wales the sergeants and constables are under the orders of the commissioner, who cannot be removed without the resolution of both Houses.

The position of the armed forces of the Crown is not strictly in point here, because if the above submissions are right the constable is for many reasons an a fortiori case to the soldier. The relationship of the armed forces is that of commander and commanded. The Supreme Commander is not the same thing as master, neither in origin nor in characteristics. To say that anyone who is subject to military law becomes the servant of the Queen for the purposes of the action per quod servitium amisit is absurd. There is nothing in the Army Act, ss. 9, 10 and 11, to import the relationship of master and servant giving rise to the action per quod servitium amisit. See also the Incitement to Mutiny Act, 1797.

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[47] 3 Man. & Gr. 88.

With regard to the authorities, the reasoning in *Attorney-General and Minister for Justice* v. *Dublin United Tramways Co. Ld.*[48] was effectively dealt with by Owen J. in the Supreme Court of New South Wales when he said: "His [Maguire P.'s] decision "was based upon a statement in the judgment of Sullivan P. in "*Carolan* v. *Minister for Defence*[49] that 'members of the armed "'forces of the State are servants of the public in the employ-"'ment of the government, and, as such, fellow servants of the "'Minister for Defence.' But . . . that passage . . . occurred "in a case in which the question was whether a Minister of State "was liable for the wrongful acts of a subordinate official, and "was used to underline the fact that there was no relationship "of master and servant between Minister and subordinate, but "that both were fellow servants of the State." *United States* v. *Standard Oil Co. of California*[50] is a much better authority in the present respondents' favour than the appellant is disposed to admit. That case cannot be regarded otherwise than as an authority for the view that in the United States at least the relationship between the armed forces and the State is not that of master and servant. So far as the police constable is concerned it would be a fortiori. It is necessary for this action that there should be the strict relationship of master and servant, whatever that means. This is not the strict case; the great majority of authority is against it: *per* Williams J. in *Quince's* case[51] and Estey J. in *Richardson's* case.[52] It is suggested in Pollock on Torts, 15th ed., p. 54, that *Attorney-General* v. *Valle-Jones*[53] was wrongly decided, and as Kitto J. said in his judgment in the present case[54]: "The only reported case in England in which

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[48] [1939] I.R. 590.

[49] [1927] I.R. 62.

[50] 332 U.S. 301.

[51] 68 C.L.R. 227, 253.

[52] [1948] S.C.R. 57, 74.

[53] [1935] 2 K.B. 209.

[54] 85 C.L.R. 237, 302.

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" the Crown has obtained damages for the loss of services of one " of its ' servants ' appears to be *Attorney-General* v. *Valle-Jones*, " where the point went by concession, and the only matter " contested before the court was the measure of damages. The " case cannot stand with the decision of this court in *The Com-* " *monwealth* v. *Quince*.[55] " The whole tenor of McCardie J.'s judgment in *Fisher* v. *Oldham Corporation*[56] is to lay stress on the independent status of the constable, and had the precise present point been taken it should have been decided in the respondents' favour.

If the action lay at the suit of employers, it is astonishing that the courts, particularly in the case of the fourth class in Blackstone—the managerial class—are not inundated with claims of this kind. The statement by Fullagar J. in the present case[57] that in *Tatum's* case[58] " the whole question now at issue simply " went by default " is a just criticism. In *Mankin* v. *Scala Theodrome Co. Ld.*[59] Stable J. only decided that there was no difference between misfeasance and non-feasance for these purposes, and the comment of Fullagar J. on that case is again accepted: " It appears to have been assumed without much " justification that Mankin was a servant of Cochrane." As was stated by Kitto J.,[60] all that was decided in *Owners of S.S. Raphael* v. *Brandy*[61] was that " the employment in the Royal Naval " Reserve of a person who was also employed on a merchant ship " was a concurrent contract of service within the meaning of the " Workmen's Compensation Act, 1906. It does not follow that " their Lordships, if they had had occasion to consider the matter, " would have held that the contract created the strict relationship " of master and servant as it is understood in the common law." *Brandy's* case[61] does not decide that a member of the armed forces is a servant of the Crown, and *Reading* v. *Attorney-General*[62] also supports the view that he is not. [Reference was also made to *Best* v. *Samuel Fox & Co. Ld.*[63]]

Lastly, on the point of damages, it is only in a very limited sense that it would be useful to discuss damages before the Board. It is impossible to ask a jury to assess in terms of money the value of the services of a public servant. There is no prima facie test of what the Crown loses or may lose by the loss of the services. Rand J. in *Richardson's* case [64] expressed the doubt, which is adopted, whether in principle the Crown can sue for the loss of a public advantage.

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[55] 68 C.L.R. 227.

[56] [1930] 2 K.B. 364, 372.

[57] 85 C.L.R. 237, 282.

[58] [1948] 2 K.B. 68.

[59] [1947] K.B. 257.

[60] 85 C.L.R. 237, 302.

[61] [1911] A.C. 413.

[62] [1951] A.C. 507; [1951] 1 T.L.R. 480; [1951] 1 All E.R. 617.

[63] [1952] A.C. 716, 721; [1952] 2 T.L.R. 246; [1952] 2 All E.R. 394.

Dingle Foot Q.C. following. All the authorities say that the office of constable is very ancient, going back to the reign of Alfred the Great, and that in early days a constable exercised a great variety of duties, some of which would now be described as quasi-judicial. He was appointed in the early days by the Court Leet. From the time of Alfred the Great until the present time, at no time has the constable been appointed or paid by the Crown; at no time has he been amenable to the orders of the Crown; and at no time has he been dismissable by the Crown. [Reference was made to the article on the position of constable in the English Historical Review, Oct. 1905, pp. 625 et seq., which was quoted by McCardie J. in *Fisher's* case,[65] and to Comyns' Digest, 3rd ed. (1792), vol. 4, pp. 692–3, Burn's Justice of Peace, 15th ed. (1785), vol. 1, pp. 383, 386, and to Maitland's Constitutional History of England, 1950 ed., pp. 485, 488.] There would appear to be nothing anywhere which suggests that at any time before 1829 a constable was ever regarded by anyone as being in any sense a servant of the Crown. From 1829 on the modern constable is superimposed on the ancient office. One always finds a reference empowering him to carry out the duties and incur the liabilities of a constable; and to find those one has to go back to the pre-statutory period. It follows, it is submitted, that the character of the office has never changed. There is a whole series of statutes showing how the same system was spread over the whole country: the Special Constables Act, 1831, s. 1; County Police Act, 1839, ss. 2, 4, 6, 8; Canals (Offences) Act, 1840; Parish Constables Act, 1842, ss. 1, 15; Town Police Clauses Act, 1847, and County and Borough Police Act, 1856, s. 7. Those Acts all apply the same test; nowhere are the powers, functions and liabilities of a constable defined by statute. In every single case the policeman under the statute is clothed with the power and charged with the duties of the constable at common law.

Another aspect of the matter is that the person who gives instructions to the constable is the Chief Constable, and the only authority over the Chief Constable is the Watch Committee or the Standing Joint Committee of the county council or quarter sessions. They are organs of local government, and the essential characteristic of local government in this country is that they are in no sense the agents or the appointees of the central government. It is submitted that the same pattern is followed in New South Wales. Also the constable's oath, both in this country and in New South Wales, contains words strikingly similar to the judicial oath, " without favour . . . malice or ill-will." The inclusion of those words do throw a good deal of light on the nature of the office; he is not there simply to serve the Sovereign, but as an officer of justice.

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[64] [1948] S.C.R. 57.

[65] [1930] 2 K.B. 364, 369.

With regard to the relationship of master and servant, my argument is summarized in Diamond on Master and Servant, 2nd ed. (1946), p. 2, and see also *In re National Insurance Act, 1911* [66]; it is submitted that a similar principle applies in the case of a constable. The relationship between him and the Chief Constable is determined by statute, and is not a matter which rests in any sense on a contract between him and his superior officer or authority.

Gahan Q.C. in reply. It was contended for the respondents that the action per quod servitium amisit was limited to a very narrow class of servants, so that even if the constable in this case could be said to be a servant of the Crown, he would be well outside the limits. It was said that the action was confined to servants within the first class mentioned by Blackstone, and that in any case it was confined within the first three classes, but did not extend so far as to relate to anyone in the fourth class. It is submitted on this point that the law did not distinguish, if the relationship of master and servant existed, between one type of servant and another. *Taylor* v. *Neri* [67] is the only case against that view. The respondents contended that generally this narrow meaning of servant was understood in the sense of menial servant or something close to that. There is a whole series of decisions which, it is submitted, indicate the contrary. The Diplomatic Privileges Act, 1708 (7 Anne, c. 12), ss. 3, 5, 6, afford an instance of the use of the word " servant," and see *Engelke* v. *Musmann*.[68] The more important officials in an embassy are included in the description of " servant " in the Act. Blackstone's classes cannot be confined so as to say that anybody in the position of a public servant is thereby necessarily excluded.

The line of old cases also makes no distinction for the purposes of this action between one servant and another: *Hart* v. *Aldridge*[69]; *Woodgate* v. *Knatchbull*,[70] in which the sheriff's officer was treated as his servant, thus treating the subordinate of a public officer as coming within the ordinary law of master and servant; and in *Blake* v. *Lanyon*[71] there is a recognition that the principle of master and servant applies between a manufacturer and a person employed. A glassmaker employed on a seven year contract was treated as a servant in *Pilkington* v. *Scott*.[72] In *Stevens'* case[73] Lord Goddard C.J. said that there was no loss of service by harbouring because the man would not have gone back in any case. On the reasoning of *Lumley* v. *Gye*[74] no distinction is to be drawn between one servant and another for the purposes of this action. The same principle applies in the present case, and there being the relationship of master and servant then an action will lie at common law, though it may be that the servant here is not on all fours with any reported case. *Davies* v. *Lord Berwick*,[75] properly viewed, does not help the respondents. To establish a relationship of master and servant there must be something in the nature of a power to direct. [Reference was also made to *De Francesco* v. *Barnum*,[76] *Fred. Wilkins and Brothers Ld.* v. *Weaver*,[77] *Admiralty Commissioners* v. *S.S. Amerika*,[78] *Attorney-General of Canada* v. *Jackson*[79] and to Hawkins' Pleas of the Crown, Bk. 2, Ch. 10, section 33.]

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[66] [1912] 2 Ch. 563, 568; 29 T.L.R. 440, 725.

[67] 1 Esp. 386.

[68] [1928] A.C. 433, 447; 44 T.L.R. 731.

Whatever may have been the position of a constable originally, in time some of the old characteristics disappeared and new ones appeared: see *Attorney-General* v. *Goddard*.[80] The position of the police constable in New South Wales is that although some of the powers and duties which are entrusted to him are defined by a reference to the common law rights and duties of a constable, yet in fact the constable is not put in the position of the holder of the common law office; his position in his employment has attached to it those rights and duties which, for practical purposes today, would boil down to the discretionary power to arrest and acting as a server of process, and there is nothing in the nature of the representing in any locality or any of the other characteristics of the constable at common law. From the Commissioner of Police down, they are all servants of the Crown; every person in the New South Wales police force, including the constable, undertakes to serve as a member of the police force, and all but the constable are undertaking to serve in the capacity in which there is nothing to give him the powers and duties at common law. When the terms of the Act are examined, and regard is had to the numerous duties which a police officer must discharge under the control of his superior from the Governor downwards, the right conclusion from the statutory provisions, particularly section 10, is that every person in the police force is a servant of Her Majesty, that there is the relationship of master and servant established by every test which is ordinarily applied, and that in those circumstances the result ought to be as it was in the Canadian case of *Rex* v. *Richardson*.[81] The action per quod servitium amisit applies.

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[69] (1774) 1 Cowp. 54.
[70] (1787) 2 Term R. 148.
[71] (1795) 6 Term R. 221.
[72] (1846) 15 M. & W. 657, 661.
[73] [1954] 3 W.L.R. 953.
[74] 2 E. & B. 216.
[75] 3 E. & E. 549.
[76] (1890) 63 L.T. 514.
[77] [1915] 2 Ch. 322.
[78] [1917] A.C. 38, 54–6.
[79] [1946] 2 D.L.R. 481.
[80] (1929) 98 L.J.K.B. 743.

March 14. The judgment of their Lordships was delivered by VISCOUNT SIMONDS. This appeal, which is brought from a judgment of the High Court of Australia affirming a judgment of the Supreme Court of New South Wales, raises a question of first-rate importance. [His Lordship stated the facts set out above and continued:] The questions that appear to arise are what are the nature and limits of the action per quod servitium amisit and whether a constable appointed under the Police Regulation Act, 1899–1947, of New South Wales stands in such a relation to the Crown that the action lies at the suit of the Crown for the loss of his services by reason of the tortious act of a wrongdoer.

References in the Act to the "office" of a constable and to his powers and duties at common law make it desirable to say something about this ancient office, and this is the more important because, unless the action per quod servitium amisit is held to extend to every case in which what is in any context called service is rendered by one who is called a servant, it is essential to define with what precision is possible the nature of the service rendered and the relation in which he who renders it stands to him to whom it is rendered. It must be said at once that it does not appear to their Lordships that the matter is concluded by recalling that under the Act a constable taking the statutory oath is deemed to be bound to "serve Her Majesty "as a member of the police force" or that he may be referred to as a servant of the Crown.

The position of a constable has been the subject of decision in recent times both in Australia and in England and it will not be necessary to traverse the whole field which their Lordships in the course of the hearing were able to survey. In *Enever* v. *The King* [1] the question was as to the liability of the Government of Tasmania for the wrongful arrest of the plaintiff by a constable in the intended performance of his duties as an officer of the peace, and a passage from the judgment of Griffith C.J. in the High Court of Australia illuminates the position.[2] "At common "law," he said, "the office of constable or peace officer was "regarded as a public office, and the holder of it as being, in "some sense, a servant of the Crown. The appointment to the "office was made in various ways, and often by election. In "later times the mode of appointment came to be regulated for "the most part by Statute, and the power of appointment was "vested in specified authorities, such as municipal authorities "or justices. But it never seems to have been thought that a "change in the mode of appointment made any difference in the "nature or duties of the office, except so far as might be enacted "by the particular Statute." The learned Chief Justice then cites [3] with approval an observation of Lord Alverstone C.J. in *Stanbury* v. *Exeter Corporation*.[4] "This case . . . is, I think, "very analogous to that of police and other officers, appointed "by a corporation, who have statutory duties to perform, where, "although they owe a duty to the corporation appointing them, "there is no ground for contending that the corporation are "responsible for their negligent acts." In the same case Barton J. points out that it is not enough merely to describe as a servant the person for whom it is sought to make the Executive Government responsible. "As I have pointed out," he says,[5] "the person must be not only the servant of the "superior but must be under the control of the superior before "the latter can be held liable. I am of opinion that that is not "the case where a constable is obeying a Statute, because when "an act is done under a Statute, an order not to do it is one "which has no weight or validity, while the order of the Executive Government to do the duty imposed by the Statute gives "no added force to the command of the Statute." The passages cited from the judgments in *Enever's* case referred to the relation of the constable to the Government in a case where the doctrine of respondeat superior was under review, and their Lordships do not suggest that the areas of the applicability of that doctrine and of the action per quod servitium amisit are necessarily coterminous. Upon this point they concur in the view expressed by Latham C.J. in *Quince's* case.[6] But in both classes of case the same question arises as to the position of a constable, and the cited passages appear to be strictly apposite. So, also, in *Fisher* v. *Oldham Corporation*,[7] where it was held that the police appointed by the watch committee of a borough corporation, if they arrest and detain a person unlawfully, do not act as the servants or agents of the corporation so as to render that body liable to an action for false imprisonment, it was necessary to consider the same question, and McCardie J., after a review of the authorities, ancient and modern, in the course of which he referred with approval to *Enever's* case [8] and with something less than approval to the *Bradford Corporation* case [9] presently to be mentioned, made this observation which appears to their Lordships to be well worth citing.[10] "Suppose" he said, "that "a police officer arrested a man for a serious felony? Suppose, "too, that the watch committee of the borough at once passed a "resolution directing that the felon should be released? Of what "value would such a resolution be? Not only would it be the "plain duty of the police officer to disregard the resolution, but "it would also be the duty of the chief constable to consider "whether an information should not at once be laid against the "members of the watch committee for a conspiracy to obstruct "the course of criminal justice." The value of this vivid illustration is that it indicates how inappropriate it would be in the view of the judge to describe the relation of watch committee and police officer as that of master and servant. This view is reinforced by his observations upon the *Bradford Corporation* case,[11] which he said he could not regard as in any way a decision that the normal relation of master and servant or principal and agent exists between a police officer and the municipal corporation within whose area he acts. "So to hold," he said,[12] "would be contrary, in my view, to statute, to established "decision and to sound public policy." *Fisher's* case [13] demands further consideration. For in it there are not only the passages already cited and other passages which appear to their Lordships, consistently with *Enever's* case,[14] to state the law correctly as to the relation of a constable to the watch committee or other appointing body, but also observations upon which appellant's counsel relied as showing that a constable is at least the servant of somebody and that with somebody the relation of master and servant exists. The judge, for instance, says of a police constable that [15] " He is a servant of the State, a ministerial officer " of the central power, though subject, in some respects, to local " supervision and regulation," and somewhat earlier he says [16]: " It is clear from *Mackalley's Case*,[17] that a constable, watchman " or the like person was regarded as a servant or minister of the " King." And he is to be regarded as a servant or minister of the King because, as Lord Blackburn said in *Coomber* v. *Justices of Berks*,[18] the administration of justice, both criminal and civil, and the preservation of order and prevention of crime by means of what is now called police, are among the most important functions of government, and by the constitution of this country these functions do of common right belong to the Crown. A constable, then, may be said in a certain context and sometimes with the appendage " or minister " to be a " servant " of the Crown." It remains to be considered whether between him and the Crown, or in the present case the Government of New South Wales, the relation of servant and master exists so as to found the action per quod servitium amisit. But before doing so their Lordships will refer to some of the points made in the course of the argument upon the position of a constable.

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[81] [1948] S.C.R. 57.

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[1] (1906) 3 C.L.R. 969.

[2] Ibid. 975.

[3] Ibid. 976.

[4] [1905] 2 K.B. 838, 841; 22 T.L.R. 3.

[5] 3 C.L.R. 983.

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[6] 68 C.L.R. 227, 235.

[7] [1930] 2 K.B. 364; 46 T.L.R. 390.

[8] 3 C.L.R. 969.

[9] [1920] 2 K.B. 135; 36 T.L.R. 286.

[10] [1930] 2 K.B. 364, 372.

[11] [1920] 2 K.B. 135.

[12] [1930] 2 K.B. 364, 375.

[13] [1930] 2 K.B. 364.

For the appellant, great stress was laid on the change that had taken place in the organization of the police force in England since the first Metropolitan Police Act of 1829 was passed. No doubt great changes have been made, which are reflected in the organization of the police force in New South Wales today, but the substantial change was made long before *Enever's* case [19] was decided in Australia or *Fisher's* case [20] in England, and those cases show convincingly that neither changes in organization nor the imposition of ever-increasing statutory duties have altered the fundamental character of the constable's office. Today, as in the past, he is in common parlance described in terms which aptly define his legal position as " a police " officer," " an officer of justice," " an officer of the peace."

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[14] 3 C.L.R. 969.

[15] [1930] 2 K.B. 364, 371.

[16] Ibid. 369.

[17] (1611) 9 Co.Rep. 65b, 68b.

[18] (1883) 9 App.Cas. 61, 67.

[19] 3 C.L.R. 969.

[20] [1930] 2 K.B. 364.

If ever he is called a servant, it is in the same sense in which any holder of a public office may be called a servant of the Crown or of the State. And here their Lordships must observe that, if a constable is by reason of his terms of service to be regarded as the servant of a master, the Government of New South Wales, so also are his superiors in the same service up to and including the Commissioners who take the same oath and are subject to the same provisions of the Police Regulation Act. The appellant did not shrink from this conclusion, but it appears to their Lordships to emphasize in a convincing manner the danger of reasoning which would admit the entertainment of an action per quod servitium amisit wherever it can be said in however general a sense that there is a contract of service or that a man is a servant of the Crown.

Next, their Lordships would refer briefly to the oath which appears from early times to have been required of the constable, as it was in varying forms required of other persons holding public office. In such an oath the word " serve " will commonly be found, just as in the case under appeal the constable Hayden swore that he would well and truly serve his Sovereign in the office of constable. It appears to their Lordships that in such a context the use of the word " serve " is of negligible significance. It is the traditional word in the context of subject and Sovereign and does not by itself import the relation of master and servant in the ordinary sense of those words. A single illustration will suffice. A special constable appointed under the Special Constables Act, 1831, is required to swear (unless, instead, he affirms) that he will well and truly serve his Sovereign in the office of special constable and so on. It may, on the other hand, be of some significance that an oath should be required to be taken at all. It is not the usual concomitant of the master and servant relationship.

Finally, before examining the history and scope of the action to which this appeal relates it is proper to refer to Blackstone's Commentaries. In the early part of the seventeenth century Lambard, writing on the " duties of constables," had referred to them as " constables and such other law ministers of the peace." Blackstone, following Lambard a century and a half later, deals with the subject in a manner to which (in agreement with Kitto J.) their Lordships attach much importance. Reference is made to the 20th edition, of 1841. In Book I, Chapter IX, the author deals with the " rights and duties of the principal subordinate " magistrates," and he treats in turn of, first, the sheriff and his officers, second, the coroner, third, the justices of the peace, fourth, the constable, fifth, the surveyor of highways, and, last, the overseers of the poor. Later writers have pointed out some errors in his treatment of the constable, but none that is relevant to the present purpose. A later chapter, the fourteenth, opens with these significant words: "Having thus commented on the "rights and duties of persons, as standing in the *public* relations "of magistrates and people, the method I have marked out now "leads me to consider their rights and duties in *private* "economical relations." He then states that there are three great relations in private life of which the first is that of master and servant "which is founded in convenience, whereby a man "is directed to call in the assistance of others, where his own "skill and labour will not be sufficient to answer the cares "incumbent upon him." It is in this connexion that he discourses on the relation of master and servant and, amongst other things, on the actions which a master may maintain in respect of his servant, including the form of action now under review. It is in the same connexion that the matter is treated in modern text-books on the law of torts, of which a single example will suffice. In Salmond on Torts, 11th ed., at p. 406, under the heading "Master and Servant: Loss of Service" the learned editor, after referring to the action, says: "In truth, the doctrine "is a historical relic of the days when a master had a proprietary "interest in his servant and seems anomalous in modern industrial conditions." This citation is more strictly relevant to the later part of this judgment, but its present importance lies in the broad distinction which Blackstone had previously made between public officers and domestic relations. There appears to their Lordships to be ample justification for saying, as was said in the High Court, that the service of a constable is "different in nature" or "on a different plane" from the domestic relation, that it is "different both in its nature and "its incidents," and that, even if some of the incidents which the law implies in the ordinary contract of service are present also in the relation of the constable to the Crown, there is a fundamental difference which makes it necessary to approach with caution the question whether a form of action available in the one case is available in the other also.

It is now time to consider the action per quod servitium amisit, its origin and development. There is no doubt that from early days a master could maintain an action against a wrongdoer for the loss of the services of his servant and that this right (to

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quote Sir William Holdsworth) "rested at bottom on the idea "that the master had a quasi-proprietary interest in his servant's "services: and that idea is connected with ideas as to the status "of a servant which originated in the rules of law applicable "to villein status." It is clear, too, from the cases cited from the Year Books and elsewhere in the learned judgment of Dixon C.J. that the action did not depend on any contract of service between master and servant but on the single fact of service. Thus, an action lay by the father for the seduction or debauching of his daughter if he could prove that she had rendered him service, however slight, and that he had been thereby deprived of that service. The law could indeed hardly have been otherwise, as the form of action in trespass was established before the concept of contract had been developed in our jurisprudence.

But, though the contractual relation had no part in the historical origin of the action, it was inevitable that, as the relation of master and servant came to be less and less a matter of status and to depend more and more on a contract between the parties, that relation should become more prominent in the cases in which this form of action was used. In particular, where the relation of master and servant lay in contract, it was an easy development to found an action per quod servitium amisit on the fact that the defendant had induced the servant to break his contract and enticed him from his master's service. And this development led in turn to the establishment of a right of action for malicious procurement of a breach of contract for personal service even where the employer and employed did not stand in the strict relation of master and servant. This was the point at issue in the celebrated case of *Lumley* v. *Gye*,[21] and in the course of the hearing before their Lordships' Board the judgments of the majority of the judges (Crompton, Erle and Wightman JJ.) and of Coleridge J., who dissented, were extensively canvassed.

It does not appear to their Lordships that the case of *Lumley* v. *Gye* [21] throws much light upon the problem to be solved in the present case. If the law had developed in all respects logically, that case would be an authority for saying that, if Miss Wagner had not been maliciously enticed from the service of the plaintiff but had been by battery or otherwise wrongfully prevented from serving him, the plaintiff would have had a good cause of action against the wrongdoer. But it has never been suggested that that is the law. On the contrary, it is fundamental (as Rich J. pointed out in *Quince's* case,[22] that the mere fact that an injury to A. prevents a third party from getting from A. a benefit which he would otherwise have obtained, does not invest the third party with a right of action against the wrongdoer: see *La Société Anonyme de Remorquage à Hélice* v. *Bennetts*.[23] Nor, strictly, is *Lumley* v. *Gye*[24] an exception to this rule, for it was not by reason of any injury to Miss Wagner that the plaintiff suffered damage. It is the better course, then, ignoring the way in which the law has developed where the wrongdoer has procured the breach of a contract of service, to examine solely the case where the master has lost the services of a servant by reason of injury to the servant. For that is the historical origin of the action and those are alleged to be the facts of the case under appeal. It appears to their Lordships to be permissible in approaching this question to bear in mind what Lord Sumner said in *Admiralty Commissioners* v. *S.S. Amerika*[25]: "Indeed, what is anomalous about the action "per quod servitium amisit is not that it does not extend to the "loss of service in the event of the servant being killed, but that "it should exist at all. It appears to be a survival from the "time when service was a status."

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[21] (1853) 2 E. & B. 216.

The question, then, may once more be stated. Is the relation of the Government of New South Wales to a constable engaged under the provisions of the Police Regulation Act, 1899 to 1947, such that this action lies? Of the two aspects of this question, viz., first, what is the relation of a constable to the Government and, secondly, what is the scope of the action, enough has been said upon the first to indicate their Lordships' view that the relation is not that of master and servant in the sense in which those terms are ordinarily used. But the appellant says that, whatever those terms strictly mean and whatever may have been the historical origin of the action, today an action lies in such a case as this. For, he says, even if (to quote again from Latham C.J. in *Quince's* case[26]) a member of the forces (and equally a constable) is not a servant of the Crown in such a sense that the ordinary law of master and servant determines the relation of the parties, yet by analogy and upon a consideration of the history of the form of action the action lies. This was perhaps the determining factor with Williams J., who said that the decision in *Quince's* case[26] was manifestly wrong because it proceeded on the view that the relationship of the Crown and a member of the armed forces was not analogous to that of a master and servant under a contract of service. And this consideration probably influenced Dixon C.J. to say[27]: "There is "no reason to suppose that the action per quod servitium amisit "would lie only for the loss of the services of persons of low "degree. In the historical development of the action per quod "servitium amisit there has not been any limitation upon the "class of services for the loss of which a private employer may "sue." With much of this their Lordships respectfully agree, but it appears to them more pertinent to consider when in its historical development and upon what consideration this form of action was first used at the suit of the Crown for the loss of the service of persons of high or low degree whose service lay in the public field. It will be seen that in England at least it was first so used at a very recent date and upon little or no consideration.

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[22] 68 C.L.R. 227, 240.

[23] [1911] 1 K.B. 243; 27 T.L.R. 77.

[24] 2 E. & B. 216.

[25] [1917] A.C. 38, 60; 33 T.L.R. 135.

[26] 68 C.L.R. 227.

Their Lordships have been referred to a large number of relevant cases. The great majority have been concerned with enticing servants from their service or harbouring them after they had left it. As already pointed out, this class of case, though it may have developed out of the original form of action, yet differs essentially from it in that injury has not been done to the servant whereby the master has lost his service but has been done solely to the master whose servant has been enticed or harboured. If this distinction is recognized, it is easy to reconcile subsequent cases. Thus, in *Taylor* v. *Neri*[28] it was held that the action per quod servitium amisit would not lie for the manager of a place of public entertainment against a person for beating one of the performers who was thereby prevented from performing, Eyre C.J. saying that "he did not think that "the court had ever gone further than the case of a menial "servant." It is not clear to what range of service the term "menial" extended in the judgment of the Chief Justice, but it is difficult to suppose that he was unaware of the limits of the action or that he did not know how far it had gone in cases of enticement and harbouring. It is more reasonable to infer that he recognized the distinction to which Crompton J. referred in *Lumley* v. *Gye*.[29] That judge, after commenting on the decision in *Taylor* v. *Neri*[30] said: "Whatever may be the law as to the

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[26] 68 C.L.R. 227.

[27] 85 C.L.R. 248.

[28] (1795) 1 Esp. 385.

[29] 2 E. & B. 216, 228.

[30] 1 Esp. 386.

"class of actions referred to, for assaulting or debauching "daughters or servants per quod servitium amisit, and which "differ from actions of the present nature for the wrongful "enticing or harbouring with notice, as pointed out by Lord "Kenyon in *Fores* v. *Wilson*,[31] it is clear from *Blake* v. "*Lanyon*[32] and other subsequent cases, *Sykes* v. *Dixon*,[33] "*Pilkington* v. *Scott*[34] and *Hartley* v. *Cummings*,[35] that the "action for maliciously interfering with persons in the employment of another is not confined to menial servants, as "suggested in *Taylor* v. *Neri*.[36]"

The distinction thus recognized is of great importance in considering the present scope of the action, for it affirms the view that the development of the law in relation to enticing and harbouring and maliciously procuring a breach of contract may properly be disregarded where the cause of action lies in injury to a servant whereby the master has lost his services. The scope of the inquiry is accordingly narrowed down to those cases in which such injury has been done and damage suffered. It must at once be said that the relevant cases are few. Up to the end of the nineteenth century the widest extension of the master and servant relationship appears to be in *Martinez* v. *Gerber*.[37] In that case the injured person, whose service was lost to the plaintiffs by reason of the reckless driving of the defendant's gig, was described as the plaintiffs' "servant and traveller." The terms of his service are not stated, but the substantial question in the case was the somewhat technical one, whether the master could maintain the action inasmuch as the servant could not have maintained an action in trespass but must have sued in case. The decision must, however, be regarded as establishing that at this date a person described as a servant and traveller stood in such a relation to his master as to support the action, and this probably represents some advance from the limit suggested by Eyre C.J. The nineteenth century closed without, so far as their Lordships are aware, any further advance, and in particular without any decision that the holder of any such office as that of a constable was a "servant" for the purpose of the rule. But in 1920 in *Bradford Corporation* v. *Webster*[38] it was held that the plaintiff corporation was entitled to recover as damages for the loss of service of a constable in their service who had been

[31] (1790) 1 Peake N.P. 77.
[32] (1795) 6 T.R. 221.
[33] (1839) 9 A. & E. 693.
[34] (1846) 15 M. & W. 657.
[35] (1847) 5 C.B. 247.
[36] 1 Esp. 386.
[37] (1841) 3 Man. & Gr. 88.
[38] [1920] 2 K.B. 135.

injured by the negligent driving of the defendant's steam wagon. The importance, however, of this decision is greatly reduced by the fact that the question whether the action lay was allowed to go by default. The question, and the only question, was what was the measure of damages which the plaintiff corporation was entitled to recover. None of the cogent considerations, which prevailed with the High Court of Australia in *Quince's* case[39] and in the present case, were brought to the notice of the court. It does not appear to their Lordships that *Webster's* case[40] can be relied on. The same observations apply to the case of *Attorney-General* v. *Valle-Jones*.[41] In that case two aircraftsmen of the Royal Air Force were injured as a result of a collision with a motor-lorry whereby the Crown lost their services, but again the only question was as to the measure of damage. The reported argument of counsel opens with the admission that the action was available to the Crown as an employer as well as to a subject. Some weight, no doubt, may be attached to the fact that judge and counsel alike in these cases assumed without question that the action lay, but their Lordships cannot regard it as a predominant consideration.

Reference should also be made to *Owners of S.S. Raphael* v. *Brandy*,[42] because reliance was placed on it by the appellant and by Williams J. in the High Court of Australia. In that case a stoker in the mercantile service, who was also a stoker in the Royal Naval Reserve and as such entitled to a retainer of £6 a year, met with an accident while employed on a merchant ship. The question was whether for the purpose of assessing his compensation under the Workmen's Compensation Act he was serving under concurrent contracts of service within the meaning of the Act, and this depended on whether he had a contract of service with the Crown under which he earned his retainer. It was held that he had, Lord Loreburn L.C. saying that he agreed with Fletcher Moulton L.J. that it was almost a typical case of concurrent contracts because the workman was being paid wages for his service on board a merchant ship and at the same time was earning his £6 a year by virtue of his engagement with the Crown, and he was giving his equivalent for that because he was keeping himself fit and doing the work which he stipulated to do. But this case is relevant only if it is assumed that where there is any contract of service the relation of servant and master necessarily arises, and their Lordships agree with Kitto J. in

[39] 68 C.L.R. 227.

[40] [1920] 2 K.B. 135.

[41] [1935] 2 K.B. 209.

[42] [1911] A.C. 413.

thinking that *Brandy's* case [42] does not justify the view that the House of Lords, if it had occasion to consider the matter, would have held that the contract there under review created that relation.

The case last cited is, however, useful as again illustrating how easily the words "serve," "service," and "servant," may be used to describe one side of a relation which is not that of master and servant. For it may be repeated that a soldier or sailor may be called a servant of the Crown: yet as Latham C.J. said in *Quince's* case [43]: "It is, I think, true that a member of "the forces is not a servant of the Crown in such a sense that the "ordinary law of master and servant determines the relations of "the parties."

Their Lordships' attention has been properly called (as was that of the High Court) to relevant cases which were decided in Canada, Eire, and the United States of America, and something must be said about them. In the Canadian case *Rex* v. *Richardson* [44] the question turned on the meaning and effect of a Canadian statute of 1943 which (inter alia) provided that "for the purpose "of determining liability in any action or other proceeding by or "against His Majesty, a person who was at any time since the "24th day of June, 1938, a member of the naval, military or "air forces of His Majesty in right of Canada shall be deemed "to have been at such time a servant of the Crown," and it was held that under this statute an action lay at the suit of the Crown for damages arising out of the loss of service of a member of the forces owing to the tortious act of the defendant. It is not for their Lordships to determine whether this case was correctly decided; its persuasive value is undoubtedly diminished by the powerful dissenting judgment of Kellock J. It is perhaps sufficient to say that the statute appears to have been enacted shortly after the decision in *McArthur* v. *The King* [45] that the Crown was not liable under the maxim respondeat superior for the negligent act of a member of its forces, and it was not difficult to come to the conclusion that the master servant relation; having been thus established for one purpose, should prevail for another also.

In the American case, *United States* v. *Standard Oil Co.*,[46] the actual decision, as Fullagar J. said, went on the grounds that no State law could apply to the Federal "Government-soldier

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[42] [1911] A.C. 413.
[43] 68 C.L.R. 227, 238.
[44] [1948] S.C.R. 57.
[45] [1943] 3 D.L.R. 225.
[46] (1947) 332 U.S. 301.

" relation " and that there was no Federal law which gave to the United States the right claimed. Their Lordships agree, too, with him in thinking that the majority of the judges of the Supreme Court were disposed to the view that the " Government-" soldier relation " differed materially from the ordinary master and servant relation.

In the Irish case *Attorney-General and Minister for Justice* v. *Dublin United Tramways Co. Ld.*[47] it appears that a different view was taken, for there it was held that the relationship of master and servant existed between the People of Eire and the Civil Guard, and that the Attorney-General representing the People could sue for and recover damages for loss of the service of a member of the Guard. Their Lordships find themselves unable to agree with this decision which, in their respectful view, gives too little weight to the considerations which have influenced them.

Their Lordships have made many references to *Quince's* case,[48] which was in the High Court regarded as indistinguishable in principle from the present case, and have freely borrowed from the judgments of Rich, Starke and McTiernan JJ. in that case. In their view its facts, at least as clearly as those of the present case, support the view that the master and servant relation, upon which the action per quod servitium amisit rests, is wholly different in kind from the relation of the Crown to a member of the armed forces, whether Field-Marshal or private soldier, and that a rule of law which applied to one should not be applied to the other unless there is compelling authority to do so. The review of the case law on the subject has shown that is far from being the fact. Their Lordships share the opinion entertained by all the judges of the High Court that the case of the constable is not in principle distinguishable from that of the soldier. Certain differentiating features such as the right given to the police under the Industrial Arbitration Act, 1940–43, cannot affect the position.

Their Lordships can now express their final opinion upon the case. They repeat that in their view there is a fundamental difference between the domestic relation of servant and master and that of the holder of a public office and the State which he is said to serve. The constable falls within the latter category. His authority is original, not delegated, and is exercised at his own discretion by virtue of his office: he is a ministerial officer exercising statutory rights independently of contract. The essential difference is recognized in the fact that his relationship to the Government is not in ordinary parlance described as that of servant and master. Nor, as would appear from quotations that have been made and others that might have been made from the dissentient judgments in *Quince's* case [48] and the present case, would a different view be taken upon this point by judges who have come ultimately to a different conclusion. It is rather upon what has been called the second aspect of the question that the difference arises. Their Lordships, differing with great respect upon this part of the case from the judgment of Latham C.J. in *Quince's* case [48] and from Dixon C.J. and Williams J. in the present case, think that this form of action should not be extended beyond the limits to which it has been carried by binding authority or at least by authority long recognized as stating the law. Their review of the relevant case law shows that, where in recent times it has been extended to cases of persons in the public service who (to repeat the now familiar words) are not servants of the Crown in such a sense that the ordinary law of master and servant determines the relation of the parties, the extension has been made without argument or deliberation. The form of action appears, as Lord Sumner said, to be a survival from the time when service was a status. That status lay in the realm of domestic relations. It would not, in their Lordships' view, be in accord with modern notions or with the realities of human relationships today to extend the action to the loss of service of one who, if he can be called a servant at all, is the holder of an office which has for centuries been regarded as a public office.

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[47] [1939] I.R. 590.

[48] 68 C.L.R. 227.

Their Lordships will humbly advise Her Majesty that this appeal should be dismissed. The appellant must pay the respondents' costs of this appeal as between solicitor and client in accordance with the condition upon which special leave to appeal was given.

Solicitors: *Light & Fulton; Bell, Brodrick & Gray.*

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[48] 68 C.L.R. 227.

[HOUSE OF LORDS.]

GOVERNMENT OF INDIA, MINISTRY OF FINANCE (REVENUE DIVISION) . . APPELLANT;

AND

TAYLOR AND ANOTHER . . . . . RESPONDENTS.

H. L. (E.)*

1954
Nov. 23, 24, 25, 29.

1955
Jan. 20.

Company—Winding up—Liabilities—Foreign tax debt—English company trading in India—Liquidation—"Liabilities"—Claim for Indian tax not provable—Companies Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 38), *ss.* 278, 283, 302.

Conflict of Laws — Revenue laws — Whether enforceable in another State—Commonwealth countries.

Judicial Precedent—United States cases—Conflict of laws—As between State and State—Lack of weight here.

The Government of India sought to prove in the voluntary liquidation of a company registered in the United Kingdom but trading in India for a sum due in respect of Indian income tax, including capital gains tax, which arose on the sale of the company's undertaking in India:—

Held, (1) that claims on behalf of a foreign State to recover taxes due under its laws were unenforceable in English courts and there was no valid distinction for this purpose between foreign States and States adhering to the British Commonwealth.

In re Visser, Queen of Holland v. *Drukker* [1928] Ch. 877; 44 T.L.R. 692 applied.

Dicta of Lord Mansfield C.J. in *Holman* v. *Johnson* (1775) 1 Cowp. 341 and *Planché* v. *Fletcher* (1779) 1 Doug. 251 considered.

(2) (*Per* Viscount Simonds, Lord Morton of Henryton and Lord Reid concurring): That the "liabilities" for which a liquidator is required to provide in the liquidation of a company by section 302 of the Companies Act, 1948, did not include claims unenforceable in the English courts, and, therefore, this claim was not such a "liability."

Per Lord Keith of Avonholm and Lord Somervell of Harrow: Although the liability to Indian tax in India may be a "liability" within section 302, it is not one which is enforceable in relation to assets in England in a liquidation here.

In re Lorillard [1922] 2 Ch. 638; 38 T.L.R. 666 approved.

Peter Buchanan Ld. v. *McVey,* post, p. 516, approved, *per* Lord Keith.

Decision of the Court of Appeal (sub nom. *In re Delhi Electric Supply and Traction Co. Ld.* [1954] Ch. 131; [1953] 2 All E.R. 1452) affirmed.

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* *Present*: VISCOUNT SIMONDS, LORD MORTON OF HENRYTON, LORD REID, LORD KEITH OF AVONHOLM and LORD SOMERVELL OF HARROW.

H. L. (E.)
1955

Government of India
v.
Taylor.

Appeal from the Court of Appeal (Evershed M.R., Jenkins and Morris L.JJ.).

This was an appeal from an order of the Court of Appeal dated November 11, 1953, dismissing an appeal by the appellant, the Government of India, Ministry of Finance (Revenue Division), from an order made by Vaisey J. in the Chancery Division of the High Court of Justice on July 30, 1953, whereby he refused to make an order on the appellant's application by summons dated June 4, 1953, under rule 108 of the Companies (Winding-up) Rules, 1949, for an order reversing a decision of the first respondent, Samuel Henry Taylor, as sole liquidator of Delhi Electric Supply & Traction Co. Ld., rejecting a proof of debt by the appellant, save that the appellant should pay the respondent's costs. On July 9, 1953, the second respondent, William Deuchars Hume, was appointed a liquidator of the company to act jointly with the first respondent and was admitted a party to the proceedings.

The facts, stated by Viscount Simonds, were as follows: The respondents to this appeal were the liquidators in the voluntary winding up of an English company, the Delhi Electric Supply & Traction Co. Ld., which was in the year 1906 incorporated for the purpose of operating an electricity supply undertaking and tramway undertakings under a licence and order granted by the Municipality of Delhi. The appellant was the Government of India, a sovereign independent republic which acknowledged Her Majesty as head of the British Commonwealth. The question for decision was whether Vaisey J. and the Court of Appeal were right in rejecting the appellant's claim to prove in the liquidation of the company in respect of an amount of income tax due from the company to the appellant under Indian income tax law.

The company having carried on its undertakings in India until the year 1947, in that year sold the whole of them to the Government of India as from March 2, 1947, for the sum of Rs.82,11,580. The greater part of that sum was paid to the company in India on March 1, 1947, and was remitted to England a few days later. The balance was paid to the company in India in September, 1948, and remitted to England shortly afterwards.

On April 18, 1947, the Indian Income Tax and Excess Profits Tax (Amendment) Act, 1947, was passed, and by section 6 thereof section 12B was inserted in the Indian Income Tax Act, 1922. The opening words of section 12B were as follows: "The tax "shall be payable by an assessee under the head 'Capital gains'

" in respect of any profits or gains arising from the sale, exchange " or transfer of a capital asset effected after March 31, 1946; " and such profits and gains shall be deemed to be income of the " previous year in which the sale, exchange or transfer took " place." This amendment was deemed by section 1 (2) of the Act of 1947 to have come into force on March 31, 1947.

On May 25, 1949, the company went into voluntary liquidation by special resolution and the respondent Taylor and one Lovering were appointed joint liquidators. They had previously as directors of the company made a statutory declaration as to the solvency of the company and later in their statement as to the position of the liquidation of the company they referred to the liability for special taxation in India. They also in March, 1951, inserted a notice in the Gazette of India calling upon all creditors to prove their debts or claims and acceded to a request by the Commissioner of Income Tax at Delhi to stay the liquidation proceedings to enable his Department to prove their claim.

On October 24, 1951, the Commissioner of Income Tax served a demand notice under section 29 of the Indian Income Tax Act, 1922, for the year 1948–49 calling on the company to pay Rs.16,54,945.11.0 of tax, which consisted mainly of a sum of Rs.15,62,817.3.0 representing tax on the surplus on the sale of the company's undertakings. Various steps were taken in India, appeals against the assessment, payment of a sum on account out of assets which were still in India, re-assessment of the amounts claimed to be due under the head " capital gains " and further demands which culminated in a claim upon the surviving liquidator Taylor in February, 1953 (Lovering having in the meantime died), for sums of Rs.15,62,817.3.0 and Rs.13,001.10.0. The quantum of those assessments was still a matter of appeal in India, but that there was some liability in India in respect of tax for capital gains was beyond doubt, and there appeared to be also an ascertained liability in respect of ordinary income tax which was not under appeal.

It was in those circumstances that the respondent Taylor in April and May, 1953, rejected the appellant's claims, stating that no part of the company's assets (all of which were then in England) could properly be applied in payment of any claim for taxes by a foreign Government. Thereupon the appellant applied to the High Court in England for an order reversing the rejection of its claim and on July 30, 1953 (the respondent Hume having in the meantime been appointed joint liquidator with the respondent Taylor), Vaisey J. made an order refusing the appellant's application. From that order the appellant appealed to the Court of Appeal (Evershed M.R., Jenkins and Morris L.JJ.) and that court unanimously dismissed the appeal.

Sir Andrew Clark Q.C., *Nelson Mustoe Q.C.*, *Robert Phillips* and *J. H. C. Morris* for the appellant. The question is whether there is a rule of English law which prevents the moneys due in respect of Indian income tax being recovered here. Admittedly it is generally assumed that there is a rule of English law to the general effect that the courts here cannot be used to enforce penalties or collect taxes imposed by a foreign State. There is no reported case of a foreign government recovering tax here or of the British Government recovering tax abroad. The nature and extent of the alleged rule has never been defined nor has the existence of such a rule ever been the subject of any direct decision before 1908, and from then onwards only in a court of first instance. The question now comes before the House of Lords for the first time to decide whether there is such a rule, how it could be framed and what is its scope. It is submitted that it only extends to penalties imposed by a foreign State for a breach of its law. It does not extend to the collection of taxes analogous to those imposed by our own legislature. A poll tax on all Jews, such as was imposed in Germany before the war, would be penal. *Attorney-General for Canada* v. *William Schulze & Co.*[1] provides an example of a penalty imposed by a foreign State. We recognize foreign exchange laws. The rule must be subject to the comity of nations and in particular the comity of those forming part of the British Commonwealth. The rule was correctly formulated in *Huntington* v. *Attrill*,[2] which is relied on, and also in Dicey on Conflict of Laws, 2nd ed., p. 207 (the last edition for which the author was solely responsible). As to the distinction between what is penal and what is not, see *Spencer (Earl)* v. *Swannell.*[3]

The trouble about a rule of law which everyone has taken for granted is that no one goes into its origin or the reason why it was first established. The basis is lost sight of and the application becomes wider and wider. The origin is the dictum of Lord Mansfield C.J. in *Holman* v. *Johnson*[4] and *Planché* v. *Fletcher*,[5] but there was no question there of foreign taxation. The courts

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[1] (1901) 9 S.L.T. 4.

[2] [1893] A.C. 150, 154, 160, 161; 8 T.L.R. 341.

[3] (1838) 3 M. & W. 154, 162.

[4] (1775) 1 Cowp. 341, 343.

[5] (1779) 1 Doug. 251, 253.

H. L. (E.)

1955

GOVERNMENT OF INDIA *v.* TAYLOR.

were only concerned with the principle of not enforcing performance of a contract which is illegal in the place of performance. In *Boucher* v. *Lawson*[6] the matter was not mentioned at all. There is no direct decision until *Sydney Municipal Council* v. *Bull*,[7] which was followed in *In re Visser, Queen of Holland* v. *Drukker*.[8] This last case takes the matter no further.

There are no adequate reasons for the imposition of the alleged rule. It has been suggested that it would be derogatory to the sovereignty of foreign States to allow such suits and that it might cause political embarrassment. But that cannot be right, because our courts have never refused to enforce other foreign laws. It would be far more likely to cause political embarrassment if it were refused to enforce revenue laws. It was also suggested that it would be contrary to public policy to enforce such laws, but no reason has been given for this, and if the laws are not confiscatory it cannot be so. There is nothing contrary to public policy in enforcing laws similar to our own. If a tax is the sort of tax which is recognized in this country it is not penal. Further, it has been suggested that the investigation of foreign tax law would be too difficult a task, but our courts have never refused to investigate foreign law on such a ground as that. All foreign law is a question of fact. It has been suggested that these taxes are of a penal character, but they are not penal in a legal sense.

A further reason for rejecting the alleged rule is that it is desirable that this country should be able to enforce its own tax laws against its own nationals abroad. Such enforcement would tend to the general comity of nations. It would be illogical if a person who committed a crime could be extradited but there was no remedy against a person who incurred a debt for taxes and fled the country. This is in the interests of everyone, including persons in this country, so as to lighten the burden on other citizens. It would be highly undesirable that this country should become a haven of refuge for foreigners who are avoiding taxes in their own country.

Clugas v. *Penaluna*[9] and *Bernard* v. *Reed*[10] have no bearing on the present case. *Waymell* v. *Reed*[11] was a case of smuggling. *Alves* v. *Hodgson*,[12] a stamp duty case, was rightly decided. See also *Bristow* v. *Sequeville*.[13] In *James* v. *Catherwood*,[14] though the decision was right, the reasoning was wrong, being directly contrary to *Alves* v. *Hodgson*.[15] *Sydney Municipal Council* v. *Bull*,[16] the first direct authority for this alleged rule, was wrongly decided because it is an extension of a principle hitherto only applied to penalties. *Henry* v. *Sargeant*,[17] which was relied on in the argument in that case, was no authority for the proposition. See also *Indian and General Investment Trust Ld.* v. *Borax Consolidated Ld.*[18] It is to be noted that in Dicey's Conflict of Laws, 2nd ed. (1908), p. 207, the rule is stated: "The court has no "jurisdiction to entertain an action for the enforcement, either "directly or indirectly, of a penal law of a foreign country." It was after *Sydney Municipal Council* v. *Bull*,[19] in the 3rd edition (1922) that the words "or revenue" were added after "penal." See also pp. 554–5 of the 2nd edition. *In re Visser, Queen of Holland* v. *Drukker*,[20] in which that case was referred to, was wrongly decided.

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[6] (1735–6) Cunn. 144.

[7] [1909] 1 K.B. 7; 25 T.L.R. 6.

[8] [1928] 1 Ch. 877; 44 T.L.R. 692.

[9] (1791) 4 Term Rep. 466.

[10] (1794) 1 Esp. 91.

[11] (1794) 5 Term Rep. 599.

[12] (1797) 7 Term Rep. 241.

[13] (1850) 5 Ex. 275.

[14] (1823) 3 Dow. & Ry.K.B. 190.

As to the enforcement in this country of foreign laws, see *Kahler* v. *Midland Bank Ld.*,[21] *Ralli Brothers* v. *Compania Naviera Sota y Aznar*[22] and *Foster* v. *Driscoll*.[23] The Foreign Judgments (Reciprocal Enforcement) Act, 1933, ss. 1 and 6, carries the present question no further.

The first statement of the alleged rule is in *Holman* v. *Johnson*,[24] *Planché* v. *Fletcher*[25] and *Lever* v. *Fletcher*[26] in Park's Marine Insurance, 8th ed., vol. I, pp. 536–7, in all of which the statement of it is a pure obiter dictum with no relation to the subject-matter of the case. The customs cases are very different from revenue cases. These cases were decided on contracts between private individuals and have nothing to do with the collection of revenue. They merely decided that where a contract is legal in the place where it is made and to be performed it is not rendered illegal because one of the parties has some future illegal act in mind. There was no decision as to the position when there is a project for the evasion of a revenue law only. The stamp cases are even further from the point. They decide that the validity of a contract depends on the lex loci contractus and the proof of the contract depends on the lex fori. Only *James* v. *Catherwood*[27] purports to go further and that was palpably wrong. In none of these cases was there any attempt to collect revenue due to a foreign country; the courts were merely considering the validity of contracts between private individuals. In the old days "revenue" and "customs" were synonymous and really Lord Mansfield's dicta are applicable only to customs and have no bearing on direct taxation like income tax. *Huntington* v. *Attrill*[28] laid down the true view that our courts will not enforce the penal laws of another country.

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[15] 7 Term Rep. 599.
[16] [1909] 1 K.B. 7.
[17] (1843) 13 N.H. 321, 332.
[18] [1920] 1 K.B. 539, 550; 36 T.L.R. 125.
[19] [1909] 1 K.B. 7.
[20] [1928] 1 Ch. 877.
[21] [1950] A.C. 24, 27, 29, 36, 46, 57; 65 T.L.R. 663; [1949] 2 All E.R. 621.
[22] [1920] 2 K.B. 287; sub nom. *Sota y Aznar* v. *Ralli Brothers*, 36 T.L.R. 456.
[23] [1929] 1 K.B. 470, 495–6, 508–9, 519; 45 T.L.R. 185.
[24] 1 Cowp. 341.
[25] 1 Doug. 251.
[26] (1780) Unrep.

In the United States of America there has been a tendency to relax the rigidity of the alleged rule in Missouri and Kentucky, though not in New York and Delaware: see *Milwaukee County* v. *M. E. White Co.*[29]; *State ex rel. Oklahoma Tax Commission* v. *Rodgers*[30]; *State of Ohio* v. *Arnett*,[31] and *Wayne County* v. *American Steel Export Co.*[32] As to the practice in other federations, see *Gilchrist* v. *Davidson.*[33]

At any rate, once a company is in liquidation the alleged rule has no operation, for the "liabilities" which the liquidator in a voluntary winding up is bound to discharge include taxes due to a foreign State in respect of which the company could be sued in the courts of that State: see section 302 of the Companies Act, 1948. In sections 278 and 283 "liabilities" and "debts" must include obligations such as this one, not enforceable in this country. "Liability" may have a wider meaning than "debt." See also sections 212, 307, 316 and 317. Section 316 is even wider than section 302. In this respect the situation must be the same in a voluntary and in a compulsory winding up. In the latter the court will direct a liquidator to discharge foreign taxes on the ground of fair dealing, and the same principle applies in the former. Proof in the liquidation is the last chance of collecting a debt from the company, and no one to whom the company owes money should be debarred unless the Act says so. If the terms of the Act are capable of covering any person with a genuine claim it should be so construed. The rule in *In re Condon, Ex parte James*[34] is that the court will not allow its officer to rely on a legal defence if it would be unconscionable to do so. This is a consideration material to the construction of the Companies Act, as indicating that " liabilities " are not confined to liabilities enforceable by direct action in the English courts. (See also sections 212 and 307.) They include any liability which should be included in the company's balance sheet immediately before its liquidation. Though the rule in *In re Condon, Ex parte James* [34] does not deal with voluntary liquidations, if the officer of the court will be ordered to pay certain debts on the ground of fair dealing, different lines could not be followed in a voluntary and a compulsory winding up. The debts must be " liabilities " within section 212 and therefore within section 257, which does not cut down the meaning of the word. See also *In re Thellusson* [35] and *In re Opera Ld.*[36] " Liability " is a word of the widest possible application and conveys anything which the company might be ordered to pay, and in section 302 it includes any sum which the liquidator would be ordered to pay if he were an officer of the court. Normally " liabilities " would connote any money which the company was liable to pay without any restriction as to time or place of payment or the court in which it could be enforced. They must include all obligations existing immediately before the date when the winding-up resolution takes effect. Those obligations include the liability of a company to a foreign State, in whose territory it was carrying on business, for taxes imposed on it by that State. It is a liability which, if a balance sheet had been drawn up immediately before the liquidation, would have been bound to be included. In all ordinary parlance it is a liability of the company. Such obligations could only be excluded by inserting qualifying words into section 302, e.g.: " On a winding up the property of the company shall be " applied in satisfaction of its liabilities to the extent to which " they are enforceable in the English courts." That is the effect of the decision of the Court of Appeal in the present case. But the liabilities include any debt in India for which judgment could be obtained there. The only limitation would be the case of a judgment which could be set aside on the ground that it was obtained by fraud or that it was contrary to natural justice. As to the scope of " liabilities," see *In re General Rolling Stock Co.*[37] and *Gooch* v. *London Banking Association.*[38]

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[27] 3 Dow. & Ry.K.B. 190.
[28] [1893] A.C. 150.
[29] (1935) 296 U.S. 268.
[30] (1946) 193 S.W. (2d) 522.
[31] (1950) 314 Ky. 403; 234 S.W. (2d) 722.
[32] (1950) N.Y. 277 App.Div. 585; 101 N.Y. (2d) 522.
[33] (1849) 1 Legge (N.S.W.) 539.
[34] (1874) L.R. 9 Ch. 609.

Statute-barred debts are not an apt analogy. They are by the express provisions of the Limitation Act, 1939, not recoverable: see section 2 and the definition of "action" in section 31 (1).

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[34] (1874) L.R. 9 Ch. 609.

[35] [1919] 2 K.B. 735, 745, 754; 35 T.L.R. 732.

[36] [1891] 2 Ch. 154; 7 T.L.R. 655.

[37] (1872) L.R. 7 Ch. 646.

[38] (1886) 32 Ch.D. 41.

No help is derived from the hypothesis of an express statutory trust to discharge the company's liabilities because one returns to the question what are liabilities? [Reference was made to *In re Dean.*[39]]

On the whole matter, there is no rule of English law prohibiting a claim for Indian income tax being enforced here, and even if there is such a rule it is excluded by the express provisions of the Companies Act because the liability for income tax is a liability within the Act.

Mustoe Q.C. following. The English cases go nowhere near the point relied on by the respondents. They are all cases between subject and subject or else between a British subject and a foreign subject. The present point was not present to the judge's mind in *Holman* v. *Johnson.*[40] The estate duty legislation of this country can have extraterritorial effect. Every State can tax to the extent to which it is practicable to tax: see *Colquhoun* v. *Brooks.*[41] The rule alleged by the respondents has been doubted in the United States: see Restatement of the Law (Conflict of Laws), 1948 supplement, section 610.

If any liabilities were to be excluded from section 302 of the Companies Act, 1948, words would have to be written into the section. The liability now in question ought properly to be included in a balance sheet, which without it would not be complete. There is nothing in the Act to suggest a narrower construction of "liabilities." The purpose of a winding up is a general settlement before all the claimants lose their rights. If this kind of debt for foreign taxes is not a liability within section 302, then it never was a liability of the company. The proposition put forward by the respondents proves too much; it would have repercussions beyond section 302. If the company had wished to reduce its capital instead of going into liquidation this debt could not have been ignored: see section 67.

[Reference was also made to Goodrich's Handbook of the Conflict of Laws, 3rd ed., pp. 163–5.]

J. Millard Tucker Q.C., *Raymond Jennings Q.C.* and *Oliver Smith* for the respondents. In *King of the Hellenes* v. *Brostron*[42] it was said that it was an elementary proposition that our courts could not be used to enforce foreign revenue law. That is a direct decision on the point. There are also obiter dicta: *Cotton* v. *Rex.*[43] See also Foreign Judgments (Reciprocal Enforcement) Act, 1933, s. 10. The rule was upheld in *In re Visser, Queen of Holland* v. *Drukker*,[44] where the argument put forward for the appellant in the present case was unsuccessfully submitted. There is no other direct authority, but often the plainer a proposition is, the harder it is to find authority for it. The proposition now submitted as a matter of law is that tax imposed on an individual by a foreign government cannot be sued for here. This is not qualified by any such proposition as that in order to be enforceable the foreign tax legislation should be reasonable or that there must be a territorial connexion between the taxing State and the person taxed. One can imagine the difficulties arising in the hypothetical case of a foreign government operating a radio station and attempting to tax persons in this country who received its broadcasts.

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[39] (1889) 41 Ch.D. 552; 5 T.L.R. 404.

[40] 1 Cowp. 341.

[41] (1889) L.R. 14 App.Cas. 493; 5 T.L.R. 728.

[42] (1923) 16 Ll.L.Rep. 190, 193.

It was once doubted whether a foreign sovereign could sue in this country at all: see *Barclay* v. *Russell*,[45] *Hullett* v. *King of Spain*[46] and *King of the Two Sicilies* v. *Willcox.*[47] One should not start with the proposition that a foreign sovereign can sue here generally with certain exceptions. One should start by saying that he can only sue here when he is seeking to enforce a proprietary right on behalf of his subjects generally, but that he cannot sue in respect of a right depending entirely on his own royal prerogative or in respect of a demand made by virtue of his power to make laws. That would be a "matter of application "from State to State": *Barclay* v. *Russell.*[48] Such rights rest on force and authority and have no extraterritorial validity. The reason why such rights cannot be enforced in the municipal courts of another State is that the concern of private international law is with private rights. Penal, revenue and confiscatory laws deal with public claims by the sovereign and not private rights. The position would not be the same as the present if after the Indian Government had obtained possession of a taxpayer's money it was stolen by a thief; the Government could sue to recover it in this country. The right principle was applied in *In the Estate of Maldonado.*[49]

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[43] [1914] A.C. 176, 195; 30 T.L.R. 71.

[44] [1928] Ch. 877; 44 T.L.R. 692.

[45] (1797) 3 Ves. 424, 431, 432.

[46] (1828) 2 Bligh N.R. 31, 46, 47, 53.

[47] (1851) 1 Sim.N.S. 301, 333.

[48] 3 Ves. 424, 431.

[49] [1954] P. 223, 240; [1953] 2 All E.R. 1579.

Under section 302 of the Companies Act, 1948, the only debts capable of proof are those capable of being enforced by legal process in this country, i.e., by action or distress: see sections 212, 257, 278, 302 and 317. As to the position in a winding up, section 283 (2) (*b*) only applies to liabilities capable of proof in the forthcoming winding up: see the Companies (Winding-up) Rules, 1949, made under section 365, rule 3 and form 108. If while the company had been in business, having assets in India, it had been resolved to wind it up, the liabilities would not have included Indian taxes, but those taxes would have been deducted from the estimate of the Indian assets. If there were no Indian assets the taxes would not be paid.

As to the liability of a liquidator in a voluntary winding up, see *In re Home and Colonial Insurance Co. Ld.*[50] Section 307 of the Act is confined to enforceable liabilities of the company. Under section 138 of the Companies Act, 1862, if a debt was disputed the only remedy for the creditor was to bring an action: see *In re Poole Firebrick and Blue Clay Co.*[51] The amendment in section 25 of the Companies Act, 1900, introduced only a procedural change and was not intended to give the creditors any greater rights. The position was unchanged that the claim must be capable of being enforced in an action. The case of a statute-barred debt is a perfect analogy. The right remains but the remedy is barred by law: see Halsbury's Laws of England, 2nd ed., vol. XX, p. 602; *In re River Steamer Co., Mitchell's Claim*[52]; *In re General Rolling Stock Co.*[53]; *In re Art Reproduction Co. Ld.*[54]; *In re Lorillard.*[55]

The appellant relied on *In re Condon, Ex parte James*,[56] but at most it deals with a discretionary power of the court. There has been no case where it has been exercised without there having been some enrichment of a bankrupt or an insolvent company at the expense of the person seeking recoupment. *Attorney-General for Canada* v. *William Schulze & Co.*[57] does not support the appellant. What was said there was only relevant to the enforcement of a penalty.

It would be unfortunate if there were any uncertainty as to what liabilities can be proved in a winding up. They must be enforceable in this country by legal process; any other conclusion introduces uncertainty. The only position that can be deduced from the authorities is that the debt now in question is not enforceable by legal process here.

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[50] [1930] 1 Ch. 102, 125, 128; 45 T.L.R. 658.

[51] (1873) L.R. 17 Eq. 268.

[52] (1871) L.R. 6 Ch. 822.

[53] L.R. 7 Ch. 846.

[54] [1952] Ch. 89.

[55] [1922] 2 Ch. 638; 38 T.L.R. 666.

[56] L.R. 9 Ch. 609.

[57] (1901) 9 S.L.T. 4.

There is no distinction between countries within the British Commonwealth and those outside it. India became a sovereign democratic republic by the Constitution adopted on November 26, 1949.

Jennings Q.C. following. As to sections 278 and 283 of the Companies Act, 1948, see *In re Home and Colonial Insurance Co. Ld.*,[58] a valuable case because it is an instance of a company which by reason of its liabilities could not continue in business. It is a fallacy to approach the question what is the meaning of "liabilities" in section 302 by finding other uses of the word in the Act and assuming that it has the same meaning throughout.

Section 283 requires a declaration of solvency. The statement in this case was headed as "showing assets at estimated realizable values and liabilities expected to rank." The liabilities are those which would rank in a winding up. They are not to be judged by the different criterion of what would appear in a balance sheet immediately before the winding up. A company might have assets in India and no liabilities there, but to get those assets to England they would be subjected to a duty. One could not put the assets on one side of the balance sheet without putting the duty on the other, and the duty would be shown, not because it was a liability within section 283 or section 278 (1) (*c*), but because it was a qualification of the assets.

It would be an anomaly if foreign taxes were not recoverable when the company was alive but were recoverable when it was dying. The principle suggested for the appellant would apply to laws confiscating property in this country. To allow that principle would be a breach of the rule that English courts will not collect foreign taxes. The Companies Act is not so clear as to override the rule.

Sir Andrew Clark Q.C. in reply. "Liabilities" is a word which must be taken here in its ordinary meaning, and that would include foreign tax liabilities. It would not be an honest representation of the company's affairs not to disclose this liability. It would be a misrepresentation within *Derry* v. *Peek*.[59] The cumulative force of all the sections of the Act indicates that its intention is as contended for by the appellant. The respondents'

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[58] [1930] 1 Ch. 102, 119, 124–5.

[59] (1889) 14 App.Cas. 337; 5 T.L.R. 625.

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argument relating to section 278 (1) (*c*) begs the question what is a liability. *In re Home and Colonial Insurance Co. Ld.*[60] is of no help because it was a case of a void debt, which is on quite a different footing. In section 283 of the Act "debts" must include debts for foreign taxation in the place where the company carries on business. Section 302 is expressed in the widest possible terms. *In re Poole Firebrick and Blue Clay Co.*[61] illustrates a defect in the Companies Act, 1862, which the legislature remedied in 1900. Statute-barred debts provide no analogy to the present case. *In re Lorillard* [62] does not help here because it is a case of the administration of an estate. It has nothing to do with the Companies Act and is no analogy.

Their Lordships took time for consideration.

VISCOUNT SIMONDS stated the facts and continued: The questions raised in the appeal to this House are two: (a) whether there is a rule of law which precludes a foreign State from suing in England for taxes due under the law of that State, and (b) whether (assuming the first question to be answered in the affirmative) a claim for Indian taxes is nevertheless a "liability" within the meaning of section 302 of the Companies Act, 1948, which the liquidators are bound to discharge. The Court of Appeal agreed with Vaisey J. in answering to the first question "Yes" and to the second question "No" and I have no doubt that they were right.

My Lords, I will admit that I was greatly surprised to hear it suggested that the courts of this country would and should entertain a suit by a foreign State to recover a tax. For at any time since I have had any acquaintance with the law I should have said as Rowlatt J. said in the *King of the Hellenes* v. *Brostron* [1]: "It is perfectly elementary that a foreign government cannot come here—nor will the courts of other countries allow our Government to go there—and sue a person found in that jurisdiction for taxes levied and which he is declared to be liable to in the country to which he belongs." That was in 1923. In 1928 Tomlin J. in *In re Visser, Queen of Holland* v. *Drukker*,[2] after referring to the case of *Sydney Municipal Council* v. *Bull*,[3] in which the same proposition had been unequivocally stated by Grantham J., and saying that he was bound to follow it, added: "My own opinion is that there is a "well-recognized rule, which has been enforced for at least 200 "years or thereabouts, under which these courts will not collect "the taxes of foreign States for the benefit of the sovereigns of "those foreign States; and this is one of those actions which these "courts will not entertain." My Lords, it is not seemly to weigh the pronouncements of living judges, but it is, I think, permissible to say that the opinions of few, if any, judges of the past command greater respect than those of Lord Tomlin and Rowlatt J., and what appeared to one of them to be a "well-"recognized rule" and to the other "elementary" law cannot easily be displaced.

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[60] [1930] 1 Ch. 102.

[61] L.R. 17 Eq. 268.

[62] [1922] 2 Ch. 638.

[1] (1923) 16 Ll.L.Rep. 190, 193.

[2] [1928] Ch. 877, 884; 44 T.L.R. 692.

[3] [1909] 1 K.B. 7; 25 T.L.R. 6.

My Lords, the history and origin of the rule, if it be a rule, are not easy to ascertain and there is on the whole remarkably little authority upon the subject. I am inclined to agree with the Court of Appeal that the early cases of *Attorney-General* v. *Lutwydge* [4] and *Boucher* v. *Lawson*,[5] to which some reference was made, do not give much help. It is otherwise when we advance a few years to the age of Lord Mansfield C.J. That great judge in a series of cases repeated the formula "For no "country ever takes notice of the revenue laws of another." See *Planché* v. *Fletcher*,[6] *Holman* v. *Johnson* [7] and *Lever* v. *Fletcher*.[8] The last-named case I find only in a textbook, Park on Marine Insurance, which in its day ran through many editions. I am myself referring to the 8th edition, vol. I, pp. 506–7. The author James Allan Park, himself a distinguished judge of the Common Pleas, states the rule as I have cited it from *Planché* v. *Fletcher* [9] and then proceeds: "In another case, a short time "afterwards, at Guildhall, Lord Mansfield, in his charge to the "jury, advanced the same doctrine which had been established "by the whole court in the preceding case." He then refers to *Lever* v. *Fletcher*.[10] It is true that Lord Mansfield was not directly concerned with the case of a foreign power suing in an English court to recover revenue, but with the validity of a contract made abroad where the seller was not implicated in smuggling operations which contravened the revenue laws of this country or with the rights of insurers where a ship which had cleared for Ostend went direct to Nantes thereby affecting the customs dues payable abroad. But in each case he could not have reached his conclusion but for the fact that he applied the rule that no country ever takes notice of the revenue laws of another. Where Lord Mansfield led, Lord Kenyon C.J. followed, though he was not a judge who followed blindly. I agree with the learned Master of the Rolls [11] that it is clear from such cases as *Clugas* v. *Penaluna*,[12] *Bernard* v. *Reed* [13] and *Waymell* v. *Reed* [14] that Lord Kenyon accepted without qualification the broad rule which Lord Mansfield had formulated. I pass over a number of cases where the question was as to the admissibility of documents made in a foreign country and not stamped according to the law of that country, pausing only to remind your Lordships that in *James* v. *Catherwood* [15] Lord Tenterden (then Abbott C.J.) said: "This point is too plain for argument. It "has been settled, or at least considered as settled, ever since "the time of Lord Hardwicke that in a British court we cannot "take notice of the revenue laws of a foreign State." The learned Chief Justice went on to apply the rule in a manner that may not have been justified but that does not detract from the importance of his unqualified assertion of it.

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[4] (1729) Bunb. 280.
[5] (1735–6) Cunning. 144.
[6] (1779) 1 Doug. 251, 253.
[7] (1775) 1 Cowp. 341, 343.
[8] (1780) Unrep.
[9] 1 Doug. 251.
[10] Unrep.

Here, my Lords, is a formidable array of authority. It is possible that the words "take notice of" might, if applied without discrimination, lead to too wide an application of the rule; for as Lord Tomlin pointed out in *In re Visser* [16] there may be cases in which our courts, although they do not enforce foreign revenue law, are bound to recognize some of the consequences of that law, and for this reason the terms of Lord Mansfield's proposition have been criticized. But in its narrower interpretation it has not been challenged except in the three cases mentioned earlier in this opinion and in them it was unequivocally affirmed.

Nor does the matter rest there. For Sir Andrew Clark, who argued the case for the appellant with equal vigour and candour, admitted that he knew of no case in which a foreign State had recovered taxes by suit in this country nor of any case in any foreign country in which the government of this country had done so. And in this connexion it is worthy of note that, as my noble and learned friend, Lord Somervell of Harrow, has by his independent researches discovered and will presently tell your Lordships, this same rule is stated in at least one French textbook of high authority.

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[11] [1954] Ch. 131, 147–9; [1953] 2 All E.R. 1452.

[12] (1791) 4 Term Rep. 466.

[13] (1794) 1 Esp. 91.

[14] (1794) 5 Term Rep. 599.

[15] (1823) 3 Dow. & Ry.K.B. 190, 191.

[16] [1928] Ch. 877, 883.

The matter is carried one step further by the fact that the rule appears to have been recognized by Parliament. For I see no other reason for the exclusion from the advantages of the Foreign Judgments (Reciprocal Enforcement) Act, 1933, of a judgment for " a sum payable in respect of taxes or other charges " of a like nature or in respect of a fine or other penalty " (section 1 (2) (*b*)), except that it was regarded as axiomatic that the courts of one country do not have regard to the revenue laws of another and therefore will not allow judgments for foreign taxes to be enforced.

It may well be asked, then, upon what grounds this appeal is founded. I think that counsel relied upon two main grounds, first that Lord Mansfield's proposition, which I have more than once quoted, extended to revenue law a doctrine properly applicable only to penal law and (I think it must be faced) that Lord Mansfield was wrong in so extending it and everyone who has since followed him was wrong: and secondly that, whatever may have been the rule in the past, there ought to be and is a trend towards a mitigation of the rule, particularly as between States which are united by the bonds of federal union or by such looser ties as bind the British Commonwealth of nations.

My Lords, these seem to me frail weapons with which to attack a strong fortress. The suggestion that Lord Mansfield's proposition was too wide was supported partly by the fact that in *Huntington* v. *Attrill*[17] the proposition was somewhat more narrowly stated, as it was also in the case of the *Attorney-General for Canada* v. *William Schulze & Co.*[18] In those cases the question was of enforcement of a penalty imposed by a foreign State and the observations of the court were directed to that question. This seems to me an inadequate reason for challenging a wider statement in regard to a different subject-matter. Further, upon the assumption which must be made, that the decision in *Huntington* v. *Attrill*[19] was correct, it was conceded that it must cover not only a penalty strictly so-called but also any tax which could be regarded as penal or confiscatory. This seems to me to create a difficult task of discrimination, which is not made easier by the test suggested by counsel. " If a tax," he said, " is the " sort of tax which is recognized in this country, it is not penal."

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[17] [1893] A.C. 150; 8 T.L.R. 341.

[18] (1901) 9 S.L.T. 4.

[19] [1893] A.C. 150.

I am little disposed to introduce so nice a refinement into a rule which has hitherto been stated in terms that are easy to understand and to apply.

Then some reliance was placed on the fact that in earlier editions of Dicey's Conflict of Laws the relevant rule was thus stated: " The court has no jurisdiction to entertain an action for " the enforcement, either directly or indirectly, of a penal law of " a foreign country "; and that it was only after the decision of *Sydney Municipal Council* v. *Bull*[20] that in later editions the words " or revenue " were added after " penal." (Later the words " or political " were also added.) This seems to me a worthless argument, for already in the earlier editions it was said that the " essential characteristic, in short, of a penal action is " that it should be an action on behalf of the government or the " community, and not an action for remedying a wrong done to " an individual " (see, e.g., 2nd ed., at p. 208), an apt description, as it seems to me, of a suit to recover taxes.

The second branch of the argument for the appellant was directed to showing that in the United States of America there had been in certain States a disposition to relax the rigidity of the rule, and counsel was able to point to certain cases not cited to the Court of Appeal where the courts of one State had admitted and enforced claims for revenue by another State, notably in the States of Missouri and Kentucky. And reference was made also to the fact that in the 1948 supplement to the well-known " Restatement " some doubt was cast upon the rule (Conflict of Laws, section 610). But it was conceded that this was not the trend in all States, the States of New York and of Delaware continuing to apply the old rule. My Lords, I do not think it necessary to occupy your time by an examination of the American cases. I am ever willing to get help from seeing how the law, which is our common heritage, has developed on the other side of the Atlantic, but a development which is not universal, and is in any case confined to relations between State and State within the Union, can have no weight in determining what the law is in this country.

Finally, it was urged that, whatever might be the position as between this country and a foreign country, it was not the same as between different members of the British Commonwealth, including those members which, though within the Commonwealth, do not acknowledge the sovereignty of the Queen. For such a distinction there is no authority and I can see no reason. If such a change is to be made, it is not for the courts to make it. It will be the task of Governments and perhaps of Parliaments. I do not think that it will be an easy task.

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[20] [1909] 1 K.B. 7.

I must add that since writing this part of my opinion I have learned from my noble and learned friend, Lord Keith of Avonholm, that he has discovered a case in the courts of Eire which confirms the view I have expressed.

I come then, my Lords, to the second question and will not detain you long, for, with all deference to those who have thought otherwise, I find it an easy one to answer.

We proceed upon the assumption that there is a rule of the common law that our courts will not regard the revenue laws of other countries: it is sometimes, not happily perhaps, called a rule of private international law: it is at least a rule which is enforced with the knowledge that in foreign countries the same rule is observed. And since it is a rule which operates equally in regard to natural and artificial persons, the company, with which we are here concerned, could not on the day before its resolution to wind up became effective have been sued by the Indian Government for the recovery of tax in the courts of this country. But it is said that from the moment that the company went into liquidation the situation changed, the old rule of law was abrogated, and our courts became the means of collecting the taxes of a foreign power. This may seem the more surprising when it is remembered that the winding up of a company, whether voluntarily or by the court, is only the machinery by which an entity, which can no longer, or at least no longer usefully, carry on its business, is brought to its statutory end. It is difficult to see why such a process should create new rights in foreign powers hitherto unknown in this or any other country. But it is said that under section 302 of the Companies Act, 1948, the "liabilities" which the liquidator in a voluntary winding up is bound to discharge include an obligation to pay tax due to a foreign State. All turns on the meaning of the word "liabilities" in this section. On the one hand it is said by the respondents that it means only those obligations which are enforceable in an English court, and on the other hand that its meaning is extended —I do not know how far—but at least so far as to cover liabilities for foreign tax in respect of which the company might have been sued in the courts of the country imposing it.

My Lords, I have no hesitation in adopting the former of these meanings. I conceive that it is the duty of the liquidator to discharge out of the assets in his hands those claims which are legally enforceable, and to hand over any surplus to the contributories. I find no words which vest in him a discretion to meet claims which are not legally enforceable. It will be remembered that, so far as is relevant for this purpose, the law is the same whether the winding up is voluntary or by the court, whether the company is solvent or insolvent, and that an additional purpose of a winding up is to secure that creditors who have enforceable claims shall be treated equally, subject only to the priorities for which the statute provides. It would be a strange result if it were found that the statute introduced a new category of creditors to compete with those who alone, apart from it, could enforce their claims.

It was urged upon your Lordships that in certain other sections of the Act, notably sections 278 and 283, " liabilities " must include obligations not enforceable in this country. That may well be, but, though I accept the proposition that a word should be used in the same sense throughout a statute, it is by no means a universal rule and I am not pressed by it in construing a section of an Act so long and complex as the Companies Act, 1948, where a word may be and, in the case of " liabilities " in fact is, used in many different contexts.

I am, on the other hand, satisfied that the case of a statute-barred debt presents a very close analogy and that in concluding that the present claim cannot be admitted your Lordships are assisted by such cases as *In re Lorillard*[21] and *In re Art Reproduction Co. Ld.*,[22] which were in my opinion rightly decided.

I would dismiss this appeal with costs.

LORD MORTON OF HENRYTON. My Lords, I had prepared some observations on the important questions which arise on this appeal, but I have formed the view that these observations add nothing of value to the speech which has just been delivered by my noble and learned friend on the Woolsack. I shall, therefore, say only that I agree with his reasoning and with his conclusion.

LORD REID. My Lords, I concur.

LORD KEITH OF AVONHOLM. My Lords, on the first issue raised in this appeal I am in full concurrence with the opinion of my

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[21] [1922] 2 Ch. 638; 38 T.L.R. 666.

[22] [1952] Ch. 89; [1951] 2 T.L.R. 979; [1951] 2 All E.R. 984.

Lord Keith of Avonholm.

noble and learned friend Viscount Simonds. Such additional observations as I make under this head are due to the fact that I have had access to a judgment delivered by Kingsmill Moore J. in the High Court of Eire on July 21, 1950, in the case of *Peter Buchanan Ld.* v. *McVey.*[23] This admirable judgment, which somehow has escaped the notice of the reporters, covers all the points raised under this head of the appeal and was affirmed by the Irish Court of Appeal on December 19, 1951. It illustrates two propositions: (1) that there are circumstances in which the courts will have regard to the revenue laws of another country; and (2) that in no circumstances will the courts directly or indirectly enforce the revenue laws of another country. We are not concerned to consider in this case the validity of the first proposition or the limits to be put upon it. But it is interesting to notice how it was applied in the case cited. The plaintiff company was a company registered in Scotland which had been put into liquidation by the revenue authorities in Scotland under a compulsory winding-up order in respect of a very large claim for excess profits tax and income tax. The liquidator was really a nominee of the revenue. The defendant held 99 one pound shares of the capital of the company and the remaining share was held by a confidential cashier and bookkeeper as trustee for him. These two sole shareholders were also sole directors. The defendant having realized the whole assets of the company in his capacity as a director and having satisfied substantially the whole of the company's indebtedness, other than that due to the revenue, by a variety of devices had the balance transferred to himself to his credit with an Irish bank and decamped to Ireland. The action was in form an action to recover this balance from the defendant at the instance of the company directed by the liquidator. The first answer of the defendant was that, as he had received the money from the company in his capacity as a shareholder in pursuance of an agreement between all the corporators, the company could not now ask to have it back. The judge held that the transaction was a dishonest transaction designed to defeat the claim of the revenue in Scotland as a creditor and was ultra vires of the company and accordingly rejected the defendant's submission. On the other hand, he held that although the action was in form an action by the company to recover these assets it was in substance an attempt to enforce indirectly a claim to tax by the revenue authorities of another State. He accordingly dismissed the action. The judgment contains an able and exhaustive examination of the authorities.

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[23] Post, p. 516.

One explanation of the rule thus illustrated may be thought to be that enforcement of a claim for taxes is but an extension of the sovereign power which imposed the taxes, and that an assertion of sovereign authority by one State within the territory of another, as distinct from a patrimonial claim by a foreign sovereign, is (treaty or convention apart) contrary to all concepts of independent sovereignties. Another explanation has been given by an eminent American judge, Judge Learned Hand, in the case of *Moore* v. *Mitchell*,[24] in a passage, quoted also by Kingsmill Moore J. in the case of *Peter Buchanan Ld.*[25] as follows: "While the origin of the exception in the case of penal liabilities "does not appear in the books, a sound basis for it exists, in my "judgment, which includes liabilities for taxes as well. Even in "the case of ordinary municipal liabilities, a court will not "recognize those arising in a foreign State, if they run counter "to the 'settled public policy' of its own. Thus a scrutiny of "the liability is necessarily always in reserve, and the possibility "that it will be found not to accord with the policy of the "domestic State. This is not a troublesome or delicate inquiry "when the question arises between private persons, but it takes "on quite another face when it concerns the relations between "the foreign State and its own citizens or even those who may "be temporarily within its borders. To pass upon the provisions "for the public order of another State is, or at any rate should "be, beyond the powers of the court; it involves the relations "between the States themselves, with which courts are incom-"petent to deal, and which are intrusted to other authorities. "It may commit the domestic State to a position which would "seriously embarrass its neighbour. Revenue laws fall within "the same reasoning; they affect a State in matters as vital to "its existence as its criminal laws. No court ought to undertake "an inquiry which it cannot prosecute without determining "whether those laws are consonant with its own notions of what "is proper."

On either of the explanations which I have just stated I find a solid basis of principle for a rule which has long been recognized and which has been applied by a consistent train of decisions. It may be possible to find reasons for modifying the rule as between

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[24] (1929) 30 F. (2d) 600, 604.

[25] Post, p. 516.

States of a federal union. But that consideration, in my opinion, has no relevance to this case.

On the second question in this appeal I have come with reluctance to the view that the distribution sections of the winding-up provisions of the Companies Act are controlled by the same considerations. I do not find it necessary to give the word "liabilities" different meanings in the various sections. In particular in sections 278 (1) (*c*), 283 and 302 it can, in my opinion, bear the same meaning. I find it impossible to hold that assessment to Indian income tax does not impose a liability on the company. From the point of view of the Indian Government it obviously is a liability. If there were assets of the company in India attached or attachable for the tax no one could doubt that it was a liability. It cannot cease to be a liability because the Indian assets have all been brought to this country. It is, in my opinion, a liability within the meaning of section 302. But the section is speaking in general terms. When the liquidators come to distribute the assets in satisfaction of the liabilities they find that this particular liability is unenforceable. It is as if it were written down to zero. Let me take the position before the date of the resolution for winding up. The company could have paid the tax if so minded. Equally it could have refused to pay the tax. If it had been sued the action would have been dismissed. That would not have extinguished the liability. The liability would have remained exactly as before. But if after the dismissal of the action the company went into liquidation, can it be that a duty then emerges on the liquidators under section 302 of the Act to pay the tax which has been successfully resisted by the company before the winding up started? I can see no ground for so holding.

I was impressed for a time by the reference made by counsel for the appellant to the rule of *In re Condon, Ex parte James*.[26] Counsel stressed that he could not appeal to the rule as directly applicable, for it applied only to an officer of the court, which the liquidator in a voluntary winding up was not. But as I understood him, the suggestion was that the court, in a compulsory winding up, would direct a liquidator to pay the tax on the ground of honesty and fair dealing and it would be impossible to follow one line in a winding up by the court and another in a voluntary winding up, a view, I may observe, taken in another connexion by Wynn-Parry J. in *In re Art Reproduction Co. Ld.*[27]

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[26] (1874) L.R. 9 Ch. 609.

[27] [1952] Ch. 89.

The rule, however, which at best is exercised as a discretionary power by the court, appears to have been exercised only in cases where there has been some form of enrichment of the assets of a bankrupt or insolvent company at the expense of the person seeking recoupment. No case has been brought to our notice of the application of the rule where there has been no enrichment of one party with corresponding loss to the other.

While, then, this is a liability in the sense of section 302 of the Act, it is not a liability which the liquidators were bound to pay. This, in my opinion, is not to contradict the section. The same situation could arise where there was a debt statute-barred in this country, but not statute-barred in another country. If there were assets in that other country sufficient to meet the debt, a liquidator might be compelled to recognize the debt as a liability that had to be discharged. If there were no assets in that country and recovery had to be sought in this country, the liquidator could not be compelled to pay it out of assets in his hands: *In re River Steamer Co., Mitchell's Claim*,[28] *In re Art Reproduction Co. Ld.*[29] The reasons given in the passage already cited from Judge Learned Hand's judgment in *Moore* v. *Mitchell*[30] are as cogent, in my opinion, against a liquidator in this country recognizing a claim for taxes demanded by a foreign country as they are against the enforceability of such a claim in a court of law. It is not for a liquidator to discriminate between the merits or demerits of the claim. He must allow all such claims, or none. The liquidators here could pay the Indian tax with the consent of the contributories, as there are no other creditors who could be prejudiced. But they cannot be compelled to pay it if the contributories withhold their consent.

For these reasons I agree the appeal should be dismissed.

LORD SOMERVELL OF HARROW. My Lords, the facts and the circumstances in which the present issue came before our courts have already been stated.

The first issue in the present appeal is whether a foreign State can use the courts of this country for the collection of its taxes. The statement by Lord Mansfield in *Holman* v. *Johnson*[31]: "For no country ever takes notice of the revenue "laws of another," may include the present issue but goes beyond it and is, I think, directed to a different problem. The plaintiff claimed the price of tea delivered in Dunkirk. The defendant intended, as the plaintiff knew, to smuggle the tea into England. Lord Mansfield uses the words cited in considering the lex loci contractus. He is stating that the courts there would in no circumstances have regard to any illegality arising under the revenue laws of this or any other country. He then proceeds to consider the alleged illegality under our law. The question whether today our courts would as between parties enforce a contract to break the revenue laws of another country has little if any relevance to the issue which we have to decide. In *Ralli Brothers* v. *Compania Naviera Sota y Aznar*[32] Scrutton L.J., in a passage cited by the Master of the Rolls, reserved that issue for consideration should it arise. What I desire to make clear is that I am not dealing with that issue.

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[28] (1871) L.R. 6 Ch. 822.

[29] [1952] Ch. 89.

[30] 30 F. (2d) 600.

[31] 1 Cowp. 341, 343.

There is no decision binding on your Lordships' House and the matter therefore falls to be considered in principle. If one State could collect its taxes through the courts of another, it would have arisen through what is described, vaguely perhaps, as comity or the general practice of nations inter se. The appellant was therefore in a difficulty from the outset in that after considerable research no case of any country could be found in which taxes due to State A had been enforced in the courts of State B. Apart from the comparatively recent English, Scotch and Irish cases there is no authority. There are, however, many propositions for which no express authority can be found because they have been regarded as self-evident to all concerned. There must have been many potential defendants.

Tax gathering is an administrative act, though in settling the quantum as well as in the final act of collection judicial process may be involved. Our courts will apply foreign law if it is the proper law of a contract, the subject of a suit. Tax gathering is not a matter of contract but of authority and administration as between the State and those within its jurisdiction. If one considers the initial stages of the process, which may, as the records of your Lordships' House show, be intricate and prolonged, it would be remarkable comity if State B allowed the time of its courts to be expended in assisting in this regard the tax gatherers of State A. Once a judgment has been obtained and it is a question only of its enforcement the factor of time and expense will normally have disappeared. The principle remains. The claim is one for a tax.

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[32] [1920] 2 K.B. 287, 300; sub nom. *Sota y Aznar* v. *Ralli Brothers*, 36 T.L.R. 456.

That fact, I think, itself justifies what has been clearly the practice of States. They have not in the past thought it appropriate to seek to use legal process abroad against debtor taxpayers. They assumed, rightly, that the courts would object to being so used. The position in the United States of America has been referred to, and I agree that the position as between member States of a federation, wherever the reserve of sovereignty may be, does not help.

The following passage from Pillet's Traité de Droit International Privé, 1924, paragraph 674, confirms the negative result of counsel's researches in respect of French law: "Les jugements "rendus en matière criminelle ne sont pas les seuls qui soient "soumis à la loi de la territorialité absolue. Les jugements "rendus en matière fiscale ne sont eux non plus susceptible "d'aucune execution à l'étranger, et l'on n'a même jamais songé "à la possibilité de faire exécuter sur le territoire de l'un d'eux "une sentence relative aux droits fiscaux de l'État qui aurait "été rendue sur le territoire d'un autre."

The appellant is asking the English courts to do what the courts of no other country have done. In some fields this might commend the argument but here, for the reason which I stated at the outset, it is fatal.

Some tentative suggestion was made that some different principle should apply as between members of the Commonwealth. No ground which I could follow was put forward in support.

On the question of the construction and application of section 302 of the Companies Act, 1948, I think that the appeal also fails. For myself, assuming that the word "liabilities" should have regard to the law of the country in which the company had been doing business, I would not have regarded this as sufficient to overrule the special principle that foreign States cannot directly or indirectly enforce their tax claims here.

Appeal dismissed.

Solicitors: *Stanley Johnson & Allen; Sanderson, Lee, Morgan, Price & Co.*

NOTE.

1950
July 21.

Kingsmill Moore J.

Sup. Ct. of Eire.

1951
June 19.

Maguire C.J., Murnaghan and O'Byrne JJ.

[THE HIGH COURT OF JUSTICE OF EIRE AND ON APPEAL THEREFROM TO THE SUPREME COURT.]

PETER BUCHANAN LD. AND MACHARG *v.* McVEY.

Conflict of Laws—Revenue laws—Whether enforceable in another State —Indirect enforcement—One man company—Liability in Scotland to excess profits tax—Removal of assets to Ireland—Whether honest for purpose of Scottish company law—Irish court entitled to take cognizance of fraudulent purpose against Scottish Revenue—Action by Scottish liquidator in Eire to recover assets—Attempt to enforce Scottish Revenue laws—Irish court's refusal to lend its hand for this purpose.

1950. July 21. KINGSMILL MOORE J. Peter Buchanan Ld. was incorporated under the Companies Act, 1929, on October 30, 1930, as a private company having its registered office in Scotland, and with a share capital of £100, divided into 100 shares of £1 each. The main object was to carry on the business of wine and spirit merchants, brokers and agents. Though the company was very closely associated with two other companies, Henry Simpson & Co. Ld. and James McVey Ld., both of which were almost completely controlled by the defendant, the defendant was not an original shareholder. In 1937, however, he acquired 96 out of the original 100 shares, and on November 25, 1940, he became the owner of three more. The remaining share was transferred on September 22, 1942, to Miss Farquharson, the confidential cashier and bookkeeper of the company, and she held it as trustee for the defendant, who thus became the beneficial owner of all the shares in the company. Miss Farquharson was also appointed a director, along with the defendant, and thenceforward she and the defendant were sole directors and sole shareholders in the company. She was, in theory, independent, but, having no beneficial interest and being for practical purposes the paid servant of the defendant, she was in no position to exercise an independent judgment or in any way to oppose his designs and, indeed, seems to have conceived it to be her duty to follow his suggestions in all matters of policy, and to see to the proper executing of that policy in questions of detail.

Initially, the company operated in a very small way. Profit and loss accounts were made up to March 31 of each year, and, for the four years 1937–40 inclusive, these accounts showed losses of £1,206, £176, £30 and £29. The next three years showed profits of £999, £3,145 and £1,221, but in 1944 there was again a loss of £1,707.

Behind the screen of the books the company was well on the way to making enormous profits. The minutes of an extraordinary meeting of October 3, 1940, record that: "As the directors were of opinion that "in the present state of the whiskey market larger funds could be "profitably employed, they desired power to borrow up to £20,000 for "this purpose," and that the power was given to them. The authorized sum was actually exceeded, for the balance sheet for 1942 shows that by March 21 of that year the company had borrowed from the defendant the sum of £37,851, an excess which was subsequently approved and ratified at an extraordinary general meeting on March 6, 1944.

The borrowed money was used to buy whiskey and so to increase the company's bonded stocks. The value of whiskey was soaring. While in the balance sheet of March 31, 1944, the stocks are shown at £19,834, "as valued by the managing director" (a sum which presumably corresponds to their cost price), the evidence established that those same stocks were then worth well over £300,000.

Some time before this the defendant had disposed of his interests in Henry Simpson & Co. Ld. and James McVey Ld. on very advantageous terms. The exact mechanics of this transaction have not been disclosed, but apparently all the facts were put before the Revenue, and the defendant was assured (as was the fact) that the deal did not then attract any liability for excess profits tax. But subsequently, by the provisions of the Finance Act, 1943, the transactions were made retroactively liable to pay this tax, and in July, 1944, the defendant found himself assessed in two sums, £112,388 and £42,800, making in all a total of £155,188. On December 29 of that year the Lord Advocate, acting for and on behalf of the Commissioners of Inland Revenue, issued a summons against the defendant for that amount, a procedure which by Scots law rendered the property of the defendant liable to "arrest-"ment," which I gather to be a power akin to sequestration.

Retroactive legislation, such as was brought about by the Finance Act, 1943, has recently come in for a great deal of criticism from sober thinkers on the ground that it is ethically and politically immoral. The defendant was emphatically of this opinion, though indignation, more than the niceties of political ethics, seems to have been his motive force. To find himself liable to pay £155,000, exactable by pains and penalties, in respect of operations which he had been assured were tax-free, called forth the resources of his ingenuity. If the Revenue were bent on taking from him sums to which, as he felt somewhat strongly, they had no moral claim, he on his part determined to do all that in him lay to defeat their devices, now and for the future. He evolved a plan both swift and simple. He would secretly dispose of all the valuable whiskey stocks scraped together with his private assets to safe hands in Ireland, and in due time follow his money to this jurisdiction from where, he was advised, he might safely snap his fingers in the face of a disgruntled Scottish Revenue.

I am satisfied that the general nature of the scheme was mentioned on more than one occasion to Miss Farquharson, and that she expressed no dissent, but gave her agreement—possibly a tacit agreement—to the project. I do not think that all the details of this contemplated transaction were told to her, and I do not think that those details were fully worked out at the initial stages but rather took shape to meet the necessities as they arose. When these necessities did arise Miss Farquharson co-operated actively, and I think that she must be taken to have agreed to both the general plan and its method of working, though I also think that the agreement was given because she thought that, she having no real interest in the company, it was no business of hers to disagree with the man who owned it. She has said that she knew that it was in her power to dissent, and in this I believe her. But she held the view that dissent would be vaguely improper.

The first active steps to carry out the plan were taken on March 6, 1944, by which date, although the assessments had not been made, the defendant knew of his prospective liability. An extraordinary general meeting was held, which ratified the past borrowing in excess of the then limit of £20,000, and authorized the director to borrow for the purpose of the company's business further sums not exceeding £300,000 at any one time. The company's bank account was transferred from the Clydesdale Bank to the North of Scotland Bank Ld., and by March 9 the Glasgow manager of that bank was able to advise the defendant that his directors had sanctioned advances to Peter Buchanan Ld. on current account to the amount of £204,000 against whiskey warrants to be given to the bank of stocks belonging to the company and valued at approximately £340,000 and a personal guarantee from the defendant to repay the amount. The defendant was to insure the stocks against fire and war risks at their market value, and to be responsible for all charges for rent and warehousing.

The suggested transactions were authorized at a meeting of Mr. McVey and Miss Farquharson held on March 18, 1944, and recorded as an extraordinary general meeting.

In pursuance of this arrangement whiskey warrants were signed in favour of the bank for all the company's stocks, the effect being to put the bank in a position to sell the whiskey under its own name, and from this time forward all sales were so effected even when the loan had been completely discharged and the company's account was in credit. The procedure had two advantages. It gave the bank complete security, and it enabled the sales to be carried through in a way which would not attract the attention of the Revenue to the suggestive realization by the company of all its liquid assets. For even greater security, on March 18 the defendant executed a chattel mortgage of the whiskey already transferred, and of any whiskey to be transferred in the future, to secure repayment of the existing or any future indebtedness of the company to the bank; undertook to maintain the transferred whiskey at such an amount as would show, at current market prices, a margin of 40 per cent. in value over any indebtedness to the bank; and authorized the bank, if such margin was not maintained or if the moneys due were not repaid on demand, to realize the whiskey and pay itself off.

Matters were now completely in train. The bank was secure. The defendant could draw on it immediately for over £200,000 and put this sum to his credit in Ireland. The stocks could be rapidly realized.

On April 5 the defendant, as director, drew a cheque for £200,000 payable to the National Provincial Bank Ld., lodged the cheque in person in the London office, and arranged that the amount be placed by the bank to a credit in the Munster & Leinster Bank Ld., Dublin. Miss Farquharson saw the cheque being drawn, but did not at first know the name of the payee, and so did not enter the cheque in the cash book till she ascertained the full details at the end of the month.

Another cheque, dated July 15, for the sum of £5,250 payable to the defendant, was drawn by him and by him presented at the Bath

Street branch of the North of Scotland Bank Ld., and by his orders this amount was also transferred to credit in the Munster & Leinster Bank Ld., Dublin. In the books of the company it appears as part repayment to the defendant of his loan of £22,000 odd to the company. Though drawn on July 13, it was not presented till July 26, on which day the defendant thought it time to remove his person from the Scottish jurisdiction and take up his residence in Ireland.

Before leaving, he signed in blank a number of cheques and sheets of headed notepaper, so that Miss Farquharson, who stayed behind, might be able in his absence to carry on the business of the company. From Dublin he kept in close touch with her by telephone, and was also constantly in communication with his Scottish bank manager. He was thus able, in safety, to control the realization of the whiskey stocks.

This realization went on steadily during the summer and autumn of 1944, and by the end of the year moneys to the amount of £198,999 had been received by the bank, reducing the indebtedness of the company to £40,435. By January 26, 1945, further moneys to the amount of £120,088 had come to credit, enabling further withdrawals.

On January 10 Miss Farquharson, acting on telephone instructions from Dublin, utilized one of the blank signed cheques by filling it in for £16,000 in favour of the National Bank of Scotland, lodging it, and arranging that the amount should be telegraphed to the credit of Mr. Barrett, a nominee of the defendant at the Munster & Leinster Bank Ld., Dublin. Next day the procedure was repeated for £40,000. As the blank cheques had been by now exhausted, Miss Farquharson used one of the pieces of signed letter paper on which to draw the cheque, and the defendant communicated with the bank manager to ensure that he would honour the cheque in this unusual, though perfectly valid, form. Finally we come to a cheque, dated December 18, but actually drawn by the defendant in Dublin at the end of January and by him back dated to December and forwarded to Miss Farquharson. It is for £20,000, drawn on the North of Scotland Bank Ld., and made payable to a Mr. Barrett, a nominee of the defendant. It was duly paid.

There are only two further entries in the company's bank account, a lodgment of £150, which left a final credit balance of £3,212 11s. 0d. (a sum apparently sufficient to meet the claims of all creditors other than the Revenue) and a withdrawal of that balance on May 31 by Sir Andrew Macharg as liquidator of the company.

In addition to those five cheques, moneys of the company to the amount of £45,173 13s. 4d. were applied in various ways to the private use of the defendant, so that a total of £326,423 13s. 4d. of the moneys of the company, one way or another, were made available for him. As against this must be put the £22,399 2s. 9d. which the company borrowed from him and a sum of £345 3s. 8d. cash which he left in the offices of the company. The total indebtedness with which the company seeks to charge the defendant is thus £303,179 6s. 11d. It remains to see how it is that this claim comes before this court.

Towards the end of 1944 the Scottish Revenue got wind of what was going on, and on January 18, 1945, made assessment on the company for £370,000 in respect of excess profits tax and £15,000 in respect of income tax. Those assessments were confirmed on appeal on March 1, and a petition was then issued at the suit of the Lord Advocate, suing on behalf of the Inland Revenue, to wind up the company compulsorily. On May 2 the Scottish courts made the order for winding up and appointed Andrew (now Sir Andrew) Macharg as liquidator on the application of the petitioners.

Sir Andrew is a most eminent accountant and was admittedly chosen by the Revenue because of his potentialities as a financial Sherlock Holmes. The correspondence which has been proved and his cross-examination by the Attorney-General have made clear what was, indeed, in no way concealed, that Sir Andrew worked in every respect hand in glove with the authorities in an effort " to chase the tax." That was the task for which he had been selected. He first unravelled the detail of the transactions. The next step was a suit by the company in Scotland against the defendant to recover the sum of £303,179 6s. 11d., on which judgment was recovered in default of appearance on May 7, 1946. The judgment was not final in character and no reliance is placed upon it. Finally, on May 28, 1947, a plenary summons was instituted in our courts by the company and Sir Andrew as its liquidator against the defendant.

The summons claimed an account of all moneys due to the company by the defendant as director, trustee and agent and payment of all sums so found due. Alternatively, it claimed payment of £303,179 6s. 11d. due by the defendant to the company as money had and received to the use of the company. Further specified reliefs were claimed, but no attempt was made to pursue them at the hearing. The statement of claim was served with the summons and set forth succinctly the facts which I have already stated.

[His Lordship considered the pleadings and continued:] At the trial the plaintiffs fully proved the matters of fact which I have found, and then rested. Mr. Leonard, opening for the defence, raised two points only: first, that the defendant was not liable to account as a shareholder, and that what he did was, quoad the company, unexceptionable; secondly, that this court will not give its aid to collect the taxes of a foreign country. Both points gave rise to learned and most able arguments.

The first point seems to me to admit of a relatively short answer. Admittedly the defendant received the moneys in his capacity as a shareholder and, as such, would not ordinarily be liable to account to the company. But the money was paid to him by means of cheques which he signed as director or was paid to his use in pursuance of instructions issued by him as director. A director is in a fiduciary capacity and so is liable to account for his dealings with the property of the company over which he has control. The defendant is therefore prima facie liable to account. He may be able to account satisfactorily if he shows that he was merely obeying the lawful commands of the company, his fiduciary, and Mr. Leonard says that this is what has happened and that accordingly, even if the defendant should be liable to account, he has discharged himself.

There was no formal meeting of the company to authorize the disposal of its property to the defendant, no resolution, however informal, to that effect. It is now settled law that neither meeting nor resolution is necessary. If all the corporators agree to a certain course then, however informal the manner of their agreement, it is an act of the company and binds the company subject only to two prerequisites: *In re Express Engineering Works Ld.*[1]; *Parker & Cooper Ld.* v. *Reading.*[2]

The two necessary prerequisites are (1) that the transaction to which the corporators agree should be intra vires the company; (2) that the transaction should be honest: *Parker & Cooper Ld.* v. *Reading,*[3] *per* Astbury J.

Mr. Leonard submits that the transaction was intra vires the company and, moreover (in the eyes of a court not administering Scots law), was honest. Mr. Wilson, for the plaintiffs, with a wealth of argument, submitted it was neither.

Clause 3 (22) of the memorandum of association sets forth as one object of the company: "To distribute any of the property of the company in specie or otherwise, but so that no distribution amounting to a reduction of capital be made, except with the sanction (if any) for the time being required by law." The defendant contended that what was done in this case was fully covered by the wording of this clause, was accordingly in pursuance of one of the objects of the company, and so was intra vires. But no memorandum, however specific, can sanction an act which is contrary to the provisions of the Companies Acts or to the fundamental principles of company law as laid down by the courts. One such principle which has been recognized from the earliest period of company law is that the power of a company to pay dividends or distribute its property is not unlimited. There are the interests of the creditors to be considered. A company may not, save in certain exceptional cases and subject to special procedure, reduce its capital or return capital to its members. It must not make a distribution out of borrowed money. It may only distribute what can properly and commercially be regarded as profits.

Peter Buchanan Ld. had acquired large stocks of whiskey, trading on borrowed money. Such stocks had appreciated almost incredibly owing to the lapse of time and the exceptional conditions of the war, and their value was such that their selling price, after repaying the loan from Mr. McVey, would have shown a profit of about £300,000. To this extent, if there had been no excess profits taxation, the appreciation of the stocks would be regarded as unrealized profits, and could have been distributed to shareholders after making provision for repayment of the loan and any outstanding debts. But as matters stood, the very act of realization attracted a revenue liability almost exactly equal to the amount of the profits which would otherwise have been made, for excess profits tax, after some small allowances, was payable at the rate of 100 per cent. of the profits made. The profits were, therefore, illusory.

Excess profits tax is imposed on the company and is not, as is income tax, imposed on the dividends distributed and merely deductible by the company at the source as a matter of convenience. It must, therefore —at all events, when once it is assessed—be deducted before it is possible to arrive at the amount which can lawfully be distributed to the shareholders as profits. This was established by a series of cases under the analogous excess profits duty imposed as a result of the 1914–18 war: *Collins* v. *Sedgwick*[4]; *In re Condran*[5]; *Patent Castings Syndicate Ld.* v. *Etherington*[6]; *Vulcan Motor and Engineering Co. (1906) Ld.* v. *Hampson.*[7] I do not overlook the fact that the assessment of the company did not take place till March, 1945, after the distribution had been made, and that an assessed tax does not involve any immediate liability till after the assessment has been made: *In re Winget Ld.*[8] But where such an assessment is pending, and the basis of the assessment has been fixed by statute so that it is known within very narrow limits, it is impossible to contend that in computing what are the net profits legitimately available for distribution to shareholders such contingent liability can be ignored. To do so is clearly to defraud the creditors of the company, who will find all its available assets and capital swallowed up by a priority revenue claim. Accordingly, it would appear that the agreement come to between the corporators was an agreement to distribute property otherwise than out of profits and so was to do an act ultra vires the company and was inoperative for that reason.

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[1] [1920] 1 Ch. 466; 36 T.L.R. 275.

[2] [1926] Ch. 975.

[3] Ibid. 984–5.

Does the agreement satisfy the second test of honesty? Mr. Leonard, as well as the defendant when giving evidence, was quite open in admitting that the whole object of the transactions was to defeat the tax claims of the Scottish Revenue and that, from the viewpoint of Scots law, it was an agreement to work a fraud upon the Revenue. The company has its registered office in Scotland. In Scotland it is both resident and domiciled, and so any questions as to its internal organization or the validity of its acts would ordinarily fall to be determined by the Scots law which would categorize the agreement between the corporators as highly fraudulent.

Mr. Leonard meets this argument in a very ingenious manner. He admits it valid up to a point. "But," he says, "it is not all Scots "law which is applicable. This court cannot recognize or even inform "itself of the revenue provisions of another country; therefore it must "blind its eyes to the existence to excess profits tax and, so doing, find "that the distribution was made only out of net profits."

This contention (which is quite separate from his later contention that I must not give effect to a suit which is brought to recover a foreign revenue tax) seems to me not to be supported by the weight of authority, although there are certain dicta which, if strained to the full extent of their wording, might seem to cover it.

In *Holman* v. *Johnson*,[9] decided in 1775, Lord Mansfield C.J. is reported as saying: "There are a great many cases which every country "says shall be determined by the laws of foreign countries where they "arise. But I do not see how the principles on which that doctrine "obtains are applicable to the present case. For no country ever takes "notice of the revenue laws of another." Four years later, in *Planché* v. *Fletcher*,[10] the Chief Justice repeated his view as to the non-recognition of revenue laws of a foreign country. In *James* v. *Catherwood*[11] Abbott C.J., with whom Holroyd and Best JJ. concurred, said: "It has been settled, ever since the time of Lord Hardwicke, that in a British court we cannot take notice of the revenue laws of a foreign State."

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[4] [1917] 1 Ch. 179; 32 T.L.R. 554.

[5] [1917] 1 Ch. 639; 33 T.L.R. 307.

[6] [1919] 2 Ch. 254; 35 T.L.R. 528.

[7] [1921] 3 K.B. 597.

[8] [1924] 1 Ch. 550; 40 T.L.R. 438.

[9] (1775) 1 Cowp. 341, 343.

[10] (1779) 1 Doug. 251, 253.

Despite the embracing terminology of those pronouncements, the courts, from early times, have not followed them to the full extent of their meaning. In *Alves* v. *Hodgson*,[12] *Clegg* v. *Levy*[13] and *Bristow* v. *Sequeville*[14] it was recognized that a contract which was avoided in the foreign country where it was made by reason of the absence of a stamp would be treated as void by the English courts even though the requirement of a stamp was a foreign revenue provision. The effect of these decisions has been summarized by Tomlin J. in *In re Visser, Queen of Holland* v. *Drukker*[15]: "All that those cases do is to indicate that however unwilling the courts may be to recognize foreign law, there are certain cases in which, although they do not enforce the foreign revenue law, they are bound to recognize some of the consequences of that law—namely, those cases when, as one of the terms of the law, contracts are rendered invalid by the foreign law."

Lord Mansfield's pronouncement has also been the subject of criticism by judges and the writers of textbooks. Anson's Law of Contracts, 19th ed., p. 218, says that there is no trustworthy authority for it. Dicey questions it in the 5th edition of his Conflict of Laws (pp. 657–8, n. (*q*)), and it is disapproved by the editors of the 6th edition (p. 607). Sankey L.J., in *Foster* v. *Driscoll*,[16] clearly considers the statement too wide, and Scrutton L.J. reserved liberty to consider it in *Ralli Brothers* v. *Compania Naviera Sota y Aznar*.[17]

I doubt whether Lord Mansfield intended his remarks to preclude a court from informing itself as to the provisions of a foreign revenue law in order to determine the question whether a foreign transaction was or was not fraudulent and void according to the law of that country. But, if he so intended, having regard to the cases and opinions I have cited, I must refuse to follow his view. The agreement between the defendant and Miss Farquharson was one to commit a fraud on the Scottish Revenue. It was not "honest" and so by Scots law, which I hold to be applicable, it was neither a valid act of the company nor effective to bind the company. The company is entitled to question its validity when in a position to do so.

Mr. Leonard's second submission leads into a region where the law cannot be considered free from doubt. He adopted, as a summary of his argument, two passages from Dicey's Conflict of Laws, 6th ed., General Principle No. 2 (p. lxv) and Rule 22 (p. 152). The passages are as follows:—General Principle No. 2: "English courts will not enforce a right otherwise acquired under the law of a foreign country

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[11] (1823) 3 Dow. & Ry.K.B. 190, 191.

[12] (1797) 7 Term Rep. 241.

[13] (1812) 3 Camp. 166.

[14] (1850) 5 Ex. 275.

[15] [1928] Ch. 877, 883; 44 T.L.R. 692.

[16] [1929] 1 K.B. 470, 516 et seq.; 45 T.L.R. 185.

[17] [1920] 2 K.B. 287, 300; sub nom. *Sota y Aznar* v. *Ralli Brothers*, 36 T.L.R. 456.

"*which is ordinarily applicable in virtue of English rules of the conflict of laws;* (A) where the enforcement of such right *involves the enforcement of foreign penal or confiscatory legislation or a foreign revenue law. . . .*" Rule 22: "The court has no jurisdiction at "common law to entertain an action (1) for the enforcement, either "directly or indirectly, of a penal, revenue, or political law of a foreign "State. . . ."

The principle that "the courts of no country execute the penal laws "of another" has long-standing authority both in England and in the United States. In England it was recognized in *Folliott* v. *Ogden*,[18] decided in 1792, and in *Wolff* v. *Oxholm*,[19] decided in 1817. The words quoted come from the famous judgment of Marshall C.J. in *The Antelope*,[20] decided in the United States in 1825, and were cited and adopted in *Huntington* v. *Attrill*.[21]

The application of the principle to revenue laws may be as old, though there is no reported case which lays it down before the present century. In *In re Visser, Queen of Holland* v. *Drukker* [22] Tomlin J. said: "It seems to be plain that at any rate for somewhere about 200 "years, since the time of Lord Hardwicke, the judges have had present "to their minds the notion, and have repeatedly said that the courts of "this country do not take notice of the revenue laws of foreign States." While admitting that there was no actual reported English decision on the point till 1909, he went on to say [23]: "My own opinion is that "there is a well-recognized rule, which has been enforced for at least "200 years or thereabouts, under which those courts will not collect "the taxes of foreign States for the benefit of the sovereigns of those "foreign States; and this is one of those actions which those courts will "not entertain."

The principle as applied to revenue laws had been clearly recognized in the United States as far back as 1843 by Parker C.J. when giving judgment in *Henry* v. *Sargeant*,[24] but the uncertain state of English authority may be gathered from the absence of any statement as to non-enforcement of revenue laws from the first two editions of Dicey. It appeared for the first time in the 3rd edition, published in 1922 (p. 230).

The first specific decision seems to have been given by Lord Stormonth Darling in *Attorney-General for Canada* v. *William Schulze & Co.*[25] The defenders had imported into Canada tweeds which had been seized by the customs for alleged infringements of revenue laws. On an appeal to the Canadian courts against the validity of the seizure the court awarded costs against the defenders (appellants). The Attorney-General for Canada sued subsequently in the Scottish courts on foot of the Canadian judgment for costs. Lord Stormonth Darling dismissed the action, saying [26]: "It is a well-established rule of international law "that the courts of one country will not execute or enforce the penal "law of another; and this rule applies 'not only to prosecutions and

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[18] (1789) 1 H.Bl. 123, 131.

[19] (1817) 6 M. & S. 92.

[20] (1825) 10 Wheat. 66, 123.

[21] [1893] A.C. 150, 156.

[22] [1928] Ch. 877, 881–2.

[23] Ibid. 884.

[24] (1843) 13 N.H. 321.

[25] (1901) 9 S.L.T. 4.

[26] Ibid. 4–5.

" 'sentences for crimes and misdemeanours, but to all suits in favour " 'of the State for the recovery of pecuniary penalties for any violation " 'of its statutes for the protection of its revenue or other municipal " 'laws and to all judgments for such penalties.' I quote these words " from the opinion of an American judge, because they were adopted " with approval by their Lordships of the Privy Council in the case " of *Huntington* v. *Attrill.*[27] . . . The question between the parties " was truly whether the forfeiture was lawful, and if the defenders had " succeeded the forfeiture would have been annulled. Accordingly, the " suit was truly a revenue suit; that is to say, in the sense of the " international rule, it was a penal suit. The only question, therefore, " is whether the costs of this penal suit can be so dissociated from the " suit itself as to fall outside the rule of international law." The learned judge held that the costs could not be so dissociated. This case may perhaps be regarded more properly as an illustration of that branch of the principle which lays down that this court will not enforce penalties for the infringement of foreign laws than as an example of the branch which prohibits the court from enforcing the provisions of foreign laws of a revenue nature. The next case, however, suggests that there is no real reason for distinguishing between those two branches. In *Sydney Municipal Council* v. *Bull*[28] the council sued the defendant in England for municipal improvement rate in respect of land in Australia. Grantham J. dismissed the action and said[29]: " Some limit " must be placed upon the available means of enforcing the sumptuary " laws enacted by foreign States for their own municipal purposes. . . . " The action is in the nature of an action for a penalty to recover a " tax; it is analogous to an action brought in one country to enforce " the revenue laws of another. In such cases it has always been held " that an action will not lie outside the confines of the last-mentioned " State."

In *In re Visser, Queen of Holland* v. *Drukker*[30] Her Majesty sued in England the administrator of the estate of a Dutch subject, who died domiciled in Holland, to recover Dutch death duties. Tomlin J. dismissed the suit on the authority of the last-mentioned case, indicating in the passages already quoted his own opinion of the antiquity of the rule.

Three modern dicta may be mentioned, occurring in cases which are not themselves direct authorities. In *Indian and General Investment Trust Ld.* v. *Borax Consolidated Ld.*[31] Sankey J. said: " Whilst it is " the duty of an English court to enforce an English taxing Act, it is " no part of its duty to enforce the taxing Act of another country." Lord Moulton, delivering the judgment of the Privy Council in *Cotton* v. *Rex*,[32] said: " There is no accepted principle in international law " to the effect that nations should recognize or enforce the fiscal laws " of foreign countries." And in *In re Cohen*[33] Evershed M.R. said: " As is well known, it is not the practice of civilized countries, such

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[27] [1893] A.C. 150, 157.

[28] [1909] 1 K.B. 7; 25 T.L.R. 6.

[29] [1909] 1 K.B. 7, 12.

[30] [1928] Ch. 877.

[31] [1920] 1 K.B. 539, 550; 36 T.L.R. 125.

[32] [1914] A.C. 176, 195.

[33] [1950] 2 All E.R. 36, 39.

"as France and England, to enforce the revenue laws of the other of "them."

These decisions establish that the courts of our country will not enforce the revenue claims of a foreign country in a suit brought for the purpose by a foreign public authority or the representative of such an authority, and that, even if a judgment for a foreign penalty or debt be obtained in the country in which it is incurred, it is not possible successfully to sue in this country on such judgment. They do not expressly go further, though some of the dicta suggest that there may be a principle that our courts will not lend themselves indirectly to the collection of a foreign tax and will not entertain a suit which is brought for that object. Such a wide extension is also suggested by the authorities which establish that our courts will not entertain an action for the enforcement of a penalty imposed by the laws of a foreign State, a principle which seems to have been the parent of the rule as to not enforcing foreign revenue claims. I will refer only to three of the cases on penalties.

Huntington v. *Attrill*[34] was a decision by the Privy Council in which the judgment was delivered by Lord Watson. The appellant had subscribed to a New York company on the faith of a certificate signed by the respondent and others to the effect that the whole capital of the company had been paid up in cash. The statement was false. A statute of New York provided that if any certificate given by the officers of a corporation should be false in any material representation, all the officers who should have signed it should be jointly and severally liable for the debts of the corporation contracted while they were in office. The appellant, having failed to recover his money, sued in Ontario the respondent, who had been a director of the company and had signed the certificate. The defence was that the statute imposed a penalty, and so had no extraterritorial effect. The Privy Council held that, viewing the essence of the matter, the statute was not penal because it was enacted not for the benefit of the State, nor primarily as a punishment, but as a means of redress for an injured individual. Lord Watson said[35]: "The court appealed to must determine for itself, in "the first place, the substance of the right sought to be enforced; and, "in the second place, whether its enforcement would, either directly or "indirectly, involve the execution of the penal law of another State." He continued[36]: "The rule has its foundation in the well-recognized "principle that . . . all breaches of public law punishable by pecuniary "mulct or otherwise, at the instance of the State Government, or of "someone representing the public, are local in this sense, that they are "only cognizable and punishable in the country where they were com"mitted. Accordingly no proceeding, even in the shape of a civil suit, "which has for its object the enforcement by the State, whether directly "or indirectly, of punishment imposed for such breaches by the lex "fori, ought to be admitted in the courts of any other country."

In *Raulin* v. *Fischer*[37] the defendant had been prosecuted in the French courts for negligent riding whereby she injured the plaintiff and, under the provisions of French law, in the same proceedings and by the same court she was condemned to pay 15,000 francs to the plaintiff in respect of his injuries. For this sum she was subsequently sued in England, and Hamilton J. held [38] that he must determine for himself "whether the enforcement of the plaintiff's rights would either directly "or indirectly involve the execution of the penal laws of another State." He held that the penal element in the proceedings could be separated from the remedial and gave judgment for the plaintiff.

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[34] [1893] A.C. 150.

[35] Ibid. 155.

[36] Ibid. 156.

[37] [1911] 2 K.B. 93; 27 T.L.R. 220.

Finally there is *Banco de Vizcaya* v. *Don Alfonso de Borbon y Austria.*[39] The ex-King of Spain had deposited with the Westminster Bank certain securities with instructions that they were to be held to the order of the Banco de Vizcaya as his agents. After the revolution the ex-King claimed the deposits and they were at the same time claimed by the Spanish bank, on the ground that by decree of the Spanish Government all the property of the King had been confiscated to the State and all Spanish bankers having such property or deposit had been ordered to deliver it to the Spanish Treasury. In an interpleader issue Lawrence J. rejected the claim of the bank, holding that the substance of the right sought to be enforced by the bank was the delivery to it of the securities, and that the enforcement of such right would directly or indirectly involve the execution of what were undoubtedly and admittedly penal laws of the Spanish Republic. He rejected the argument that the bank was only enforcing its own contractual rights against the Westminster Bank. In substance it was not enforcing its own contractual rights but the rights of the Spanish Republic.

Those cases on penalties would seem to establish that it is not the form of the action or the nature of the plaintiff that must be considered, but the substance of the right sought to be enforced; and that if the enforcement of such right would even indirectly involve the execution of the penal law of another State, then the claim must be refused. I cannot see why the same rule should not prevail where it appears that the enforcement of the right claimed would indirectly involve the execution of the revenue law of another State, and serve a revenue demand. There seems to me to be a reasonably close parallel between the position of the Banco de Vizcaya and the present plaintiff. In each case it is sought to enforce a personal right, but as that right is being enforced at the instigation of a foreign authority, and would indirectly serve claims of that foreign authority of such a nature as are not enforceable in the courts of this country, relief cannot be given.

I do not consider it necessary to comment on the decision of the House of Lords in *Kahler* v. *Midland Bank Ld.*[40] or the criticism which has been passed on the judgments of the majority in that case, for it appears that the decision turned on questions of fact and the form of the pleadings, and that the learned Lords who formed the majority of the court did not purport or intend to lay down any new law on the question of the non-enforceability of the penal legislation of a foreign country.

In the absence of any express authority defining the limits of the principle that the revenue legislation of a foreign State will not be given effect, directly or indirectly, in our domestic tribunal, it is natural to seek for guidance in the reasons which were assigned for establishing this principle when it was first enunciated. Here again the decisions on this side of the Atlantic afford no assistance. The principle is stated as if it were of long standing and so well established, so self evident, as to require no justification. An attempt at analysis of the underlying considerations was, however, made in 1929 by an eminent United States jurist, Judge Learned Hand. In the case of *Moore* v. *Mitchell*[41] he delivered a special concurring judgment as follows: " While the origin " of the exception in the case of penal liabilities does not appear in the " books, a sound basis for it exists, in my judgment, which includes " liabilities for taxes as well. Even in the case of ordinary municipal " liabilities, a court will not recognize those arising in a foreign State, " if they run counter to the 'settled public policy' of its own. Thus " a scrutiny of the liability is necessarily always in reserve, and the " possibility that it will be found not to accord with the policy of the " domestic State. This is not a troublesome or delicate inquiry when " the question arises between private persons, but it takes on quite " another face when it concerns the relations between the foreign State " and its own citizens or even those who may be temporarily within its " borders. To pass judgment upon the provisions for the public order " of another State is, or at any rate should be, beyond the powers of a " court; it involves the relations between the States themselves, with " which courts are incompetent to deal, and which are entrusted to other " authorities. It may commit the domestic State to a position which " would seriously embarrass its neighbour. Revenue laws fall within " the same reasoning; they affect a State in matters as vital to its " existence as its criminal laws. No court ought to undertake an " inquiry which it cannot prosecute without determining whether those " laws are consonant with its own notions of what is proper."

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[38] [1911] 2 K.B. 93, 99.

[39] [1935] 1 K.B. 140; 50 T.L.R. 284.

[40] [1950] A.C. 27; 65 T.L.R. 663; [1949] 2 All E.R. 621.

Judge Learned Hand is well known as an authority on the conflict of laws in a country where the existence of so many co-ordinate State jurisdictions has given to this branch of law a special importance and has caused it to be studied extensively. Whatever be the origin of the rule, the judge's statement of the practical basis which led to its adoption in the courts of common law and his reasons for its observance seem to me convincing and illuminating. Moreover, they suggest the importance of guarding against any attempt to evade the rule or to whittle away the scope of its application.

In deciding cases between private persons in which there is present such a foreign element as would ordinarily induce the application of the principles of a foreign law, courts have always exercised the right to reject such law on the ground that it conflicted with public policy or affronted the accepted morality of the domestic forum. Contracts valid according to what would normally be considered "the proper law" of the contract will not be enforced if in the view of the court they are tainted with immorality of one kind and another. Delicts committed abroad are not actionable here unless they are torts by our law. Slavery, or any other status involving penal or private disabilities, is not recognized. If, then, in disputes between private citizens, it has been considered necessary to reserve an option to reject foreign law as incompatible with the views of the community, it must have been equally, if not more, necessary to reserve a similar option where an attempt was made to enforce the governmental claims (including revenue claims) of a foreign State. But if the courts had contented themselves with an option to refuse such claims, instead of imposing a general rule of exclusion, the task of formulating and applying the principles of selection would have been one not only of difficulty but danger, involving inevitably an incursion into political fields with grave risks of embarrassing the executive in its foreign relations and even of provoking international complications. Neither common morality nor "settled "public policy" would have sufficed to cover the area of necessary rejection; for the nature and incidence of governmental and revenue claims are not dictated by any moral principles but are the offspring of political considerations and political necessity. Taxation originally expressed only the will of the despot, enforceable by torture, slavery and death. Though it may be conceded that in modern times it is more often designed to further a benevolent social policy, and that the civil servant has usurped the position of the executioner as the agent of enforcement, yet in essence taxation is still arbitrary and depends for its effectiveness only on the executive power of the State. Nor is modern history without examples of revenue laws used for purposes which would not only affront the strongest feelings of neighbouring communities but would run counter to their political aims and vital interests. Such laws have been used for religious and racial discriminations, for the furtherance of social policies and ideals dangerous to the security of adjacent countries, and for the direct furtherance of economic warfare. So long as these possibilities exist it would be equally unwise for the courts to permit the enforcement of the revenue claims of foreign States or to attempt to discriminate between those claims which they would and those which they would not enforce. Safety lies only in universal rejection. Such a principle appears to me to be fundamental and of supreme importance.

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[41] (1929) 30 F. (2d) 600, 604.

If I am right in attributing such importance to the principle, then it is clear that its enforcement must not depend merely on the form in which the claim is made. It is not a question whether the plaintiff is a foreign State or the representative of a foreign State or its revenue authority. In every case the substance of the claim must be scrutinized, and if it then appears that it is really a suit brought for the purpose of collecting the debts of a foreign revenue it must be rejected. Mr. Wilson has pressed upon me the difficulty of deciding such a question of fact and has replied on "ratio ruentis acervi." For the purpose of this case it is sufficient to say that when it appears to the court that the whole object of the suit is to collect tax for a foreign revenue, and that this will be the sole result of a decision in favour of the plaintiff, then a court is entitled to reject the claim by refusing jurisdiction.

If the strict application of the principle were in any way relaxed evasion would be easy and the court would be faced with all the difficulties which the adoption of the rule was designed to avoid. One example will suffice to demonstrate this. Apart from any statutory provisions (such as govern the enforcement of English bankruptcies in this country) the accepted rule is that: "An assignment of a bankrupt's property "to the representative of his creditors under the bankruptcy laws of "any foreign country, to whose jurisdiction he is properly subject . . . "operates as an assignment of the movables of the bankrupt situate in "England" (Dicey's Conflict of Laws, 6th ed., Rule 99, p. 440). A national of a foreign country after incurring a debt to its revenue, comes to Ireland bringing with him a quantity of movables. The foreign revenue instead of courting certain defeat by suing him here in its own capacity resorts to bankruptcy proceedings in its own country (as in the case of *In re Cohen*[42]), and the creditors' assignee seeks to enforce his claim here. In the course of the hearing it appears that the tax was incurred as the result of discriminatory legislation of a type repugnant to the political views of the enormous majority of the citizens of this country and that the bankrupt has sought asylum herein as a political refugee, bringing with him the remnants of his fortune. The court may admit the claim, may refuse because of the nature of this legislation, or may reject it on the broad principle that it is an attempt to collect the tax of a foreign revenue. To do the first would be to bring the courts into contempt in the eyes of the people and to offend against their own highest principles; to do the second would be publicly to censure the behaviour of a foreign State, a procedure dangerous and possibly arrogant; in the third course alone safety, propriety and a recognition of the feeling of the community are combined.

I hold as a fact—and, indeed, I understand it to be admitted—that the sole object of the liquidation proceedings in Scotland was to collect a revenue debt. There is no evidence that any ordinary creditor would not have been paid in full out of the assets left in Scotland, and as far as ordinary creditors are concerned the result of the liquidation proceedings in Scotland would be to deprive them of payment by reason of the priority in Scotland of a revenue debt. I hold that the sole object of the present proceedings before me is also to collect a Scottish revenue debt, and that if I were to decide for the plaintiff the only result of those proceedings would be that every penny recovered after paying certain costs and liquidator's remuneration could be claimed by the Scottish Revenue. That, in my opinion, is the substance of the suit—to collect the revenue claim of a foreign State. Being of this opinion, I reject the claim.

The plaintiffs appealed to the Supreme Court. The appeal was heard by Maguire C.J., Murnaghan and O'Byrne JJ.

1951. June 19. MAGUIRE C.J. This is an action by Peter Buchanan Ld. and Andrew Simpson Macharg, the official liquidator of the company, which was tried by Kingsmill Moore J., in which the plaintiffs claim an account of all moneys due to them by the defendant as director, trustee or agent of the plaintiff company and for payment of the amount found due to the plaintiffs on the taking of such account. In the alternative the plaintiffs claim payment of a sum of £303,179 6s. 11d. as balance due by the defendant to the plaintiff company for money had and received for the use of the company. Other forms of relief claimed were not pursued at the hearing nor before this court. It was not contested that the defendant had possessed himself of the sum of money claimed, which was assets of the company, nor was it denied that he had removed this sum to this country. Two issues were raised at the trial, first, whether the plaintiffs could maintain an action against the defendant for acts authorized and effected pursuant to the unanimous agreements and decisions of all the members of the company; secondly, whether the action was in substance a suit to collect a revenue debt for a foreign State and as such was maintainable in these courts.

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[42] [1950] 2 All E.R. 36.

The trial judge held that the defendant's action in removing the assets of the company out of Scotland was for the purpose of committing a fraud on the Scottish Revenue, and that although it was authorized by all the members of the company it was not honest and consequently was not a valid act of the company nor effective to bind it. He found, however, that the proceedings were in substance an attempt to enforce the Scottish revenue laws in this country and held that the court could not lend its aid for this purpose. He accordingly dismissed the action giving the defendant the general costs of the action but allowing to the plaintiffs the costs of five days of the action to be set off against the defendant's costs.

The plaintiffs move this court to reverse and discharge the order of the trial judge in so far only as the judge thereby dismissed the plaintiffs' claims and ordered the payment of any costs of the plaintiffs and for an order in terms which differ only slightly from the claims in the statement of claim on a number of grounds which may be summarized:

(1) That the trial judge had found against the evidence and the weight of evidence and misdirected himself in law in holding that the sole object of the liquidation proceedings in Scotland and of the present proceedings was to collect a Scottish revenue debt and that the only result of the proceedings would be "that every penny recovered after "paying certain liquidators' remuneration could be claimed by the "Scottish Revenue and that the substance of the suit is to collect the "revenue debt of a foreign State."

(2) That the trial judge misdirected himself in law in holding that he had no jurisdiction to adjudicate upon the plaintiffs' claim.

(3) That the judge misdirected himself in law in holding that the principles of private international law referred to in his judgment had any application to the claim pleaded by the plaintiffs in this action.

At the trial the defence had raised the two points already mentioned. The first was that the defendant was not liable to account as a shareholder, as his acts in regard to the company were quite in order and not open to challenge. As already mentioned, the trial judge held against this contention. The second point was that these proceedings were brought to enforce the revenue laws of Scotland and that the courts will not lend their aid for this purpose. This contention was accepted by the trial judge.

The rule relied upon is stated in Dicey's Conflict of Laws, 6th ed., as follows: General Principle No. 2 (p. lxv): "English courts will not "enforce a right otherwise acquired under the law of a foreign country "*which is ordinarily applicable in virtue of English rules of the conflict* *of laws;* (A) where the enforcement of such right *involves the enforcement of foreign penal or confiscatory legislation or a foreign revenue law.*" And Rule 22 (1) (p. 152): "The court has no jurisdiction at common law to entertain an action (1) for the enforcement, either directly or indirectly, of a penal, revenue, or political law of a foreign State."

This general principle and rule are exceptions to the rule arising from the comity of nations that respect is paid to the laws of foreign countries. Note No. 38 in Dicey, at p. 152, cites a number of cases which support the rule in so far as it relates to the enforcement of the revenue laws of another State. Most of these cases were referred to in the argument both in the court below and in this court. They are fully reviewed by the trial judge in his judgment. In *In re Visser, Queen of Holland* v. *Drukker*[43] Tomlin J. discussed the rule. Having examined its history he said: "My own opinion is that there is a well-recognized rule, which has been enforced for at least two hundred years or thereabouts, under which these courts will not collect the taxes of foreign States for the benefit of the sovereigns of those foreign States." The rule is equally part of our law. It is unnecessary to look for the origin of, or reason for, the rule, nor is it necessary to consider the criticism which has been directed against Lord Mansfield's dictum in *Holman* v. *Johnson*[44]: "No country ever takes notice of the revenue laws of another." At p. 642 of Dicey's Conflict of Laws, Anson on Contracts, 19th ed., p. 218, is quoted apparently with approval as saying that the dictum is "not supported by any 'trustworthy authority,'" and grounds are given for the view that the dictum is too wide. Dicey goes on to say that: "The doctrine that the law of England does not pay any regard to the revenue laws of a foreign State does not, it is submitted, extend beyond the recognized principle that an English court will not directly enforce foreign tax claims or judgments for the payment of foreign taxes." It is suggested that some significance should be given to the omission of the word "indirectly" in this passage. In my view, however, it was not intended by the author to modify in any way rule 22 (1) which, in my opinion, states a recognized rule.

It is submitted by counsel for the appellant that the trial judge considering whether the rule was applicable here should have concerned himself solely with what was the legal effect of the proceedings and not with the indirect result of them. The well-known dictum of Lord Tomlin in *Inland Revenue Commissioners* v. *Duke of Westminster*[45] was cited. In that case the Duke had so arranged that an annuity took the place of what had formerly been wages. Lord Tomlin said[46]: "Apart, however, from the question of contract, with which I have dealt, it is said that in revenue cases there is a doctrine that the court may ignore the legal position and regard what is called 'the substance of the matter,' and that here the substance of the matter is that the annuitant was serving the Duke for something equal to his former salary or wages, and that therefore, while he is so serving, the annuity must be treated as salary or wages." Rejecting this supposed doctrine

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[43] [1928] Ch. 877, 884.

[44] 1 Cowp. 341, 343.

[45] [1936] A.C. 1; 51 T.L.R. 467.

[46] [1936] A.C. 1, 19.

Lord Tomlin said[47]: " This so-called doctrine of ' the substance ' seems " to me to be nothing more than an attempt to make a man pay not-" withstanding that he has so ordered his affairs that the amount of " tax sought from him is not legally claimable."

It is argued that while a company is in liquidation it is still a company and operates in Scotland by its liquidator. A foreign State, it is said, recognizes the title given to a liquidator by the laws of his country. I agree that if the payment of a revenue claim was only incidental and there had been other claims to be met, it would be difficult for our courts to refuse to lend assistance to bring assets of the company under the control of the liquidator. But there is no question of that here. The position seems clearly to be as found by the trial judge, that these proceedings were started in Scotland with the purpose of collecting a tax—and that apart from costs and the expenses of the liquidator any moneys recovered will inevitably pass to the Revenue.

The first step in the proceedings against the defendant was taken following the assessment on January 18, 1945, on the company of £370,000 in respect of excess profits and £15,000 in respect of income tax. These assessments were confirmed on appeal on March 1. A petition was then issued at the suit of the Lord Advocate suing on behalf of the Inland Revenue to wind up the company compulsorily. On May 2 the Scottish courts made an order for winding up and appointed Sir Andrew Macharg as liquidator on the application of the petitioners. No other creditor is shown to have any claim. In these circumstances the conclusion of fact at which the judge arrived, that the sole object of the liquidation proceedings in Scotland was to collect a revenue debt—and that, apart from the costs and expenses of the liquidator, any moneys received would inevitably pass to the Revenue—was amply justified.

The point raised by the notice of the respondents of an application to vary the order of the High Court only affects the question of costs. The defendant claimed that what he did quoad the company was unexceptionable. It is admitted that there was no formal meeting of the company to authorize the disposal of its property to the defendant and no formal resolution to that effect. It is, however, settled law that no meeting and no formal resolution is necessary. It is necessary, however, that an agreement of this kind to be valid must both be intra vires the company and must be honest. The trial judge held that neither of these requisite conditions were fulfilled. As pointed out by the judge, a company may not, save in exceptional circumstances, reduce its capital to its members. What happened here could not properly be described as a reduction of capital. It was, however, the return of capital by the company to its members. This was done at a time when there was no outstanding liability save the threatened claim for tax. This did not materialize in the form of an assessment until after the disposal by the company of its assets. Accordingly, there was no immediate liability to tax: *In re Winget Ld.*[48] I consider, however, that the judge was right in holding that the company was bound to have regard to the fact that such an assessment was pending and that it was not then in a position to estimate the amount of profits or assets which could properly

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[47] [1936] A.C. 1, 20.

[48] [1924] 1 Ch. 550.

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be distributed amongst its members. I am, furthermore, in agreement with the trial judge that, from the viewpoint of Scotch law, to do so was not honest. In applying both these tests it is necessary to take notice of the claim of the Scottish Revenue. Again, however, I am in agreement with the trial judge that to take notice of the revenue law of a foreign country in order to apply these tests is not to conflict with the proposition of law which I have already accepted, that no country will enforce the revenue law of a foreign country. In his judgment in *In re Visser, Queen of Holland* v. *Drukker*[49] Tomlin J. has shown that in certain cases it is necessary to recognize foreign law. Explaining *Alves* v. *Hodgson*,[50] *Clegg* v. *Levy*[51] and *Bristow* v. *Sequeville*,[52] he said[53]: "All that those cases do is to indicate that however unwilling "the courts may be to recognize foreign law, there are certain cases in "which, although they do not enforce foreign revenue law, they are "bound to recognize some of the consequences of that law—namely, those "cases where, as one of the terms of that law, contracts are rendered "invalid by the foreign law."

It seems impossible, in considering whether the acts of the members of the company were intra vires and honest, to avoid giving the same limited recognition to the revenue laws of Scotland.

Accordingly, I am of opinion that the judge was right on both of the points argued in this case. The appeal should be dismissed. The application of the respondent should also be refused.

Appeal dismissed.

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[49] [1928] Ch. 877.
[50] 7 Term Rep. 241.
[51] 3 Camp. 166.
[52] 5 Ex. 275.
[53] [1928] Ch. 877, 883.

[HOUSE OF LORDS.]

H. L. (E.)*

1954
Dec. 2, 6, 7, 8, 9.

1955
Jan. 20.

STERLING ENGINEERING CO. LD. . . . APPELLANTS;

AND

PATCHETT . . . . RESPONDENT.

Patent—Master and Servant—Benefit of invention—Apportionment—Action for royalties or remuneration—Claim by employee—Patents Act, 1949 (12, 13 & 14 *Geo.* 6, *c.* 87), *s.* 56 (2).

By section 56 (2) of the Patents Act, 1949: "In proceedings "before the court between an employer and a person who is or was "at the material time his employee, or upon an application made "to the comptroller under subsection (1) of this section, the court "or comptroller may, unless satisfied that one or other of the "parties is entitled, to the exclusion of the other, to the benefit of

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* *Present*: VISCOUNT SIMONDS, LORD PORTER, LORD REID, LORD TUCKER and LORD SOMERVELL OF HARROW.

"an invention made by the employee, by order provide for the "apportionment between them of the benefit of the invention, and "of any patent granted or to be granted in respect thereof, in such "manner as the court or comptroller considers just."

In proceedings between an inventor and a company by which he was employed at the time when he made certain inventions, the court held that the company was entitled to the benefit of them to the exclusion of the inventor, notwithstanding an alleged understanding and agreement on which he relied to claim reasonable remuneration in respect of them, since the law imported into the inventor's contract of service with the company that he held his interest in the inventions and resulting patents as trustee for the company:—

Held, that the jurisdiction under section 56 (2) did not arise, since the word "entitled" referred to legal right and the court, having determined that the inventor had no beneficial interest in the patents, must declare itself satisfied that the company was entitled to the benefit of the inventions to the exclusion of him.

Decision of the Court of Appeal (sub nom. *Patchett* v. *Sterling Engineering Co. Ld.*) (1953) 71 R.P.C. 61 reversed.

Appeal from the Court of Appeal (Evershed M.R., Jenkins and Morris L.JJ.).

This was an appeal by the appellants, Sterling Engineering Co. Ld., who were defendants in the action, from an order of the Court of Appeal dated December 14, 1953, whereby it was ordered that the judgment of Danckwerts J., dated April 27, 1953, on their counterclaim be discharged and it was declared that the benefit of certain inventions made by the respondent, George William Patchett, who was plaintiff in the action, ought to be apportioned between the respondent and the appellants under section 56 of the Patents Act, 1949, the Court of Appeal remitting the counterclaim to the Chancery Division of the High Court of Justice for the purpose of the apportionment.

Two points arose on this appeal, viz., to determine (1) in what circumstances, if any, could an issue, which had been raised on the pleadings in an action which was dismissed, not be res judicata between the parties; (2) what was the proper construction of section 56 (2) of the Act, a new section introduced by that Act, and not hitherto considered by any court. The Court of Appeal had construed it as giving to the court the right to order a plaintiff in an action (in the present case the appellants, being the defendants bringing a counterclaim) to pay a sum of money to a defendant (in the present case the respondent, being the defendant to a counterclaim).

The facts are fully set out in the opinion of Viscount Simonds.

Shelley Q.C. and *Aldous* for the appellant company. Section 56 (2) of the Act is inappropriate to the position in this case. It is not and cannot be concerned with the payment of money by one patentee to another. Here the inventions belong to the employer. "Entitled" in the subsection means entitled according to the existing law. It is if the court comes to the conclusion that neither the master nor the servant is wholly entitled to the benefit of the invention that apportionment can be made. Apportionment must mean that the beneficial cake is divided between more than one person. This construction does not unduly limit the operation of the subsection. There are cases to which it might apply. It might be invoked where a servant has made an invention applying to refrigeration generally, while his employers are only concerned with refrigeration in a special type of business. There the rights of the employers would be limited to their own type of business.

[On the relationship of master and servant *Triplex Safety Glass Co. Ld.* v. *Scorah,*[1] *Vokes Ld.* v. *Heather*[2] and *British Celanese Co. Ld.* v. *Moncrieff*[3] were cited, and on res judicata *Hoystead* v. *Commissioner of Taxation,*[4] *Brunsden* v. *Humphrey,*[5] *Shoe Machinery Co.* v. *Cutlan (No. 2),*[6] *Priestman* v. *Thomas,*[7] *Serrao* v. *Noel*[8] and *Conquer* v. *Boot.*[9]]

Wilberforce Q.C. and *Goulding* for the respondent. The wording of section 56 (2) shows that it is contemplated that the matter of apportionment can be raised in the course of proceedings informally or by the court itself without application by either side. The subsection applies to this case. It has three possible meanings, (a) that it applied unless, after hearing the evidence, the court could find on the basis of the existing law that one or other of the parties was entitled to the invention to the exclusion of the others; or (b) that the power under the subsection existed in doubtful cases where the matter was not expressly dealt with by contract; or (c) that the subsection should be read as saying: "unless in all the circumstances of the case the court thinks that "one party is justly entitled to the exclusion of the other," so as to give a wide discretionary jurisdiction. The first is the true meaning. The appellant company's construction would render the operation of the subsection negligible.

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[1] (1937) 157 L.T. 576, 579; 54 T.L.R. 90.

[2] (1945) 62 R.P.C. 135, 141.

[3] [1948] Ch. 564, 578; [1948] 2 All E.R. 44.

[4] [1926] A.C. 155, 166; 42 T.L.R. 207.

[5] (1884) 14 Q.B.D. 141.

[6] [1896] 1 Ch. 667.

[7] (1884) 9 P.D. 70.

[8] (1885) 15 Q.B.D. 549; 1 T.L.R. 581.

[9] [1928] 2 K.B. 336; 44 T.L.R. 486.

[On apportionment *Croston* v. *Vaughan*[10] was cited; on res judicata *Hindley* v. *Haslam*,[11] *Hadley* v. *Green*,[12] *Hunter* v. *Stewart*,[13] *Henderson* v. *Henderson*,[14] *Houstoun* v. *Marquis of Sligo*[15] and *National Bolivian Navigation Co.* v. *Wilson*[16]; and on master and servant *Adamson* v. *Kenworthy*,[17] *Barnet Instruments Ld.* v. *Overton*,[18] *Aflalo* v. *Lawrence & Bullen Ld.*,[19] *Lawrence & Bullen Ld.* v. *Aflalo and Cook*[20] and *Lamb* v. *Evans*.[21]]

Shelley Q.C. in reply. The rights referred to in section 56 (1) are legal rights. "Entitled" means entitled according to the existing law. The section is designed to meet a common case, in which previously there was no appropriate remedy, by enabling the court to apportion the patent by dividing the monopoly right. The section must be read with section 63 and the definition of "exclusive licence" in section 101 (1). "Apportionment" in section 56 (2) means just what it says. It is an ordinary English word meaning cutting up the cake and does not mean an adjustment of the rights of the parties. One apportions an orange between two boys by dividing it. To give a sixpenny orange to A on condition that he gives 2d. to B is not apportioning the orange. That sort of transaction is suggested here by the respondent.

Their Lordships took time for consideration.

1955. January 20. VISCOUNT SIMONDS. My Lords, this appeal is brought by the Sterling Engineering Co. Ld., whom I will call "the company," from an order of the Court of Appeal which reversed an order of Danckwerts J. The respondent is George William Patchett and the appeal relates to six inventions made by him while in the employment of the company, which were the subject of patents registered in their joint names.

The respondent in January, 1942, entered the employment of the company as a production engineer at a salary of £1,200 a year. The company was then, and for some time afterwards, employed exclusively on armament. In December, 1941, before any contract of service was made, there was an exchange of letters and an interview between the parties in regard to any patentable invention that the respondent might make while in the company's employment. It is clear that no agreement was made, but throughout the proceedings, which have continued in an appeal to this House, it has been constantly alleged that an "understanding" was reached, and it is upon that understanding that the respondent has relied for the relief refused to him by Danckwerts J. but granted by the Court of Appeal. At the outset I must admit that I find it difficult to appreciate how an understanding, which is admittedly not an agreement, can be made a ground of claim, though it may, I daresay, in certain circumstances be a shield. But the facts of the present case are so unusual and the course which the action took so remarkable that I must closely examine what this understanding was.

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[10] [1938] 1 K.B. 540, 553, 564; 54 T.L.R. 54; [1937] 4 All E.R. 249.

[11] (1878) 3 Q.B.D. 481.

[12] (1832) 2 Cr. & J. 347.

[13] (1861) 4 De G.F. & J. 168, 175.

[14] (1843) 3 Hare 100, 114.

[15] (1885) 29 Ch.D. 448, 456; 1 T.L.R. 217.

[16] (1880) 5 App.Cas. 176.

[17] (1931) 49 R.P.C. 57, 69.

[18] (1949) 66 R.P.C. 315, 319, 323.

[19] [1903] 1 Ch. 318, 326; 19 T.L.R. 133.

[20] [1904] A.C. 17; 20 T.L.R. 42.

[21] [1893] 1 Ch. 218; 9 T.L.R. 87.

On December 11, 1941, after a previous exchange of letters and an interview to which I need not refer, the respondent wrote a letter to the company in which the following passage occurred: "Patents. This is always a delicate problem between employer "and employee and I suggest the following two methods of "dealing with this question: (*a*) Any invention for which I am "responsible will be provisionally patented by me and be trans-"ferred to you for a sum payment to be mutually arranged at "the time. (*b*) Any invention for which I am responsible will "be patented by you in the name of the firm and myself. A "sum to be paid as royalty will be fixed and a minimum yearly "royalty decided on. In the event of the minimum royalty not "being paid I shall be free to exploit the patent. Any exploita-"tion of such patent will entail a participation of the proceeds "by both patentees. This participation will also apply in any "case where the manufacturing rights are granted to other "persons" and the letter then dealt with so-called "special "constructions" with which we are not concerned. To this letter the general manager of the company, a Mr. Redgrave, replied on December 13, 1941, by a letter which contained the following passage relating to patents and no more: "Patents. "I agree that this is always a problem but feel confident when "we next meet we shall have no difficulty in making a mutually "satisfactory settlement."

It does not appear that any further letters passed between the parties and it is certain that when they next met no arrangement of any kind was made. On January 1, 1942, the respondent took up his duties as production engineer without any written service agreement. That no arrangement was made nor, as I think, in the meantime discussed, is clear from the next letter to which I refer, for on July 31, 1942, the respondent, having designed a gun in the course of his employment, which came to be called a "paragun," wrote to the chairman of the company as follows: "This gun was designed by me without "any instructions from the company and I think certain features "are patentable. Before joining the company the question of "patents . . . was discussed but no definite arrangement made. "I think this is a suitable opportunity for some arrangement to be "arrived at." The company accepted this suggestion and after an interview on August 5, 1942, an agreement, which has conveniently been called the 1942 agreement, was made. Its terms were contained in two letters of August 5 and 12, and provide (inter alia) that, where the respondent was primarily responsible for any inventions which were patentable, patents should be applied for in the two names (i.e., of the respondent and the company) and that the company should pay the respondent a royalty of ½ per cent. on the sale price of any articles made by them which used any such patent.

This agreement was general in its scope and extended beyond the invention which had been its immediate cause. In 1943 the respondent invented an automatic trigger mechanism for the purpose of the paragun, and in regard to the patent for this invention a specific agreement, known as the 1943 agreement, was made. I think it unnecessary to say more about it than that its terms were more favourable to the respondent than those of the 1942 agreement.

In 1944 yet another agreement was made. The respondent had made eight more patentable inventions in connexion with the paragun and the new agreement in effect provided that these inventions and any further inventions which the respondent might make during the term of his employment in relation to machine carbines should be comprised in the 1943 agreement. It also contained a term, which, as will be seen, came to be of great importance, that the 1942 agreement should be cancelled and of no further effect.

Some modification of the 1943 agreement was made in 1945, but no other arrangement was made and there the matter rested when, in 1947, the company having turned to the arts of peace. the respondent was offered and accepted the leadership of the department concerned with the design and development of domestic electrical appliances. It was not disputed that in this capacity it was his duty to put his inventive faculty and skill at the service of the company. Between 1947 and 1950 the respondent in the course of his employment made six inventions in connexion with domestic appliances (which I will call "the "domestic inventions") in respect of which patents were applied for in the joint names either of the respondent and the company or of the respondent and a company controlled by the company, a variation which can for the purpose of this appeal be disregarded. The applications were made at the expense of the company, but the respondent, as the inventor, was, until the Patents Act, 1949, came into force, a necessary party. The 1942 agreement had been cancelled, the later agreements did not cover the domestic inventions and in these circumstances the company refused the reiterated demands of the respondent that some payment should be made to him in respect of them.

The respondent accordingly commenced the action out of which this appeal has arisen, and I must trouble your Lordships with some details of the pleadings in the action and consequent counterclaim, for the form that they have taken has not been the least of the causes of trouble in this litigation.

The statement of claim (which was amended and reamended) opened with a plea that at the time of his employment it was "understood and agreed" between the respondent and the company that he should receive reasonable remuneration in respect of all inventions made by him while in the employment of the company which should be used by the company. It then set out the agreements of 1942, 1943 and 1944. It specifically stated the cancellation clause in the 1944 agreement to which I have referred and alleged that this clause was inserted by mutual mistake. In his formal claim the respondent claimed a royalty of $\frac{1}{2}$ per cent. on the selling price of all articles in which any of his inventions were made use of (other than those subject to the 1943 or 1944 agreements) or, alternatively, reasonable remuneration or royalties in respect thereof, and in the further alternative, rectification of the 1944 agreement so as to exclude the cancellation clause or rescission of that agreement. This is a puzzling plea: for what is meant by an "understanding and agreement"? What is the efficacy of an understanding without an agreement, or what added force an understanding gives to an agreement, I do not understand. But the action was allowed to go forward in this fashion after an ineffectual attempt had been made to discover upon an application for particulars what was the understanding, what the agreement.

The company duly put in its defence, denying any such understanding or agreement as had been alleged and further denying that there had been such a mistake as to justify rectification or rescission of the 1944 agreement. It also put in a counterclaim alleging that the domestic inventions had been made by the respondent in the course of his employment and that the company was accordingly entitled to have the respondent's interest in the relevant patents transferred to it and claiming the appropriate declaration and order.

By his reply and defence to counterclaim the respondent challenged the plea that he was employed to make inventions in connexion with domestic appliances. This was clearly contrary to the fact and does not appear to have been pursued. He further alleged that in regard to any inventions other than those comprised in the 1943 or 1944 agreements it was the " intention " of the parties " that the 1942 agreement should continue to operate " or alternatively should not be governed by any agree- " ment and should accordingly remain the sole property of " the respondent. He further pleaded that the domestic inventions were not made in the course of his employment, a plea clearly incapable of being sustained. Further pleas were made by amendment, but I do not mention them yet, for the pleadings were in the form that I have outlined when the case came on for hearing before Roxburgh J. Before that learned judge the case took a most unfortunate course, for owing to the exigencies of time or for some other reason it was found possible only to dispose of the action, the counterclaim being left over for hearing after the immediately ensuing vacation. So far as the action was concerned, an order was made whereby it was dismissed with costs, and that was all. And it is clear that whatever else your Lordships may look at in the event of a plea of res judicata being raised, you are at least entitled to know what were the issues raised in the pleadings in the action and you know therefore that the respondent failed to establish his right to remuneration under any heading of claim or to rectification of the 1944 agreement. This order was duly drawn up and the respondent did not appeal from it. I will only add here, since some reliance has been placed upon it and certainly some confusion has arisen out of it, that in the course of his judgment Roxburgh J. said [1]: " At the time of " the engagement it was understood between the plaintiff and " the defendant company that the plaintiff should receive a

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[1] (1952) 70 R.P.C. 184, 185.

"reasonable remuneration in respect of all inventions made by "him while in the employment of the defendant company which "should be used by the defendant company. I have used the "word 'understood' advisedly. There is a counterclaim, with "which I am not yet in a position to deal, and I have used that "vague word in order not in any way to prejudice the position "with regard to the counterclaim." The learned judge having decided that there was no agreement for the payment of remuneration, it is difficult to see what effect in the law is to be found in an understanding—particularly where the only plea had been of an "understanding and agreement."

Unfortunately, Roxburgh J. had other duties in the following term and it fell to Danckwerts J. to hear the counterclaim. In the course of the hearing before him the defence to counterclaim was allowed to be amended by pleading once more the "understanding and agreement" alleged in paragraph 1 of the statement of claim and by this final plea which found favour with the Court of Appeal: "In the alternative to the contentions herein "set out the plaintiff will claim that the benefit of the inventions "referred to in the counterclaim be apportioned under section "56 (2) of the Patents Act, 1949." This amendment was, as I say, allowed and it is too late to protest that it should not have been pleaded by way of defence to counterclaim but, if raised at all, should have found a place in the statement of claim.

It is convenient at this stage to set out the subsection in question (section 56 (2)), which was for the first time introduced into the patent laws by the Patents Act, 1949. [His Lordship read the subsection, and continued:] The task of disentangling the real issues from these pleadings is not made easier by the plea, strenuously urged by the appellants, that the doctrine of res judicata applied to bar the respondent's defence to the counterclaim. I will dispose of this matter very shortly, for I do not think that any decision upon it is necessary for the determination of this appeal. I am glad to think so, for in a case like this where the whole matter in dispute, whether arising on claim or counterclaim, should and would, but for an unfortunate accident, have been disposed of at one and the same time, and where the learned judge who heard the action made certain reservations with a view to their further consideration on the counterclaim, I should be very reluctant to apply the ordinary rules of res judicata. I am not aware of any case in which such a thing has happened before and may be permitted to hope that it will not happen again.

It is unnecessary to say more because it became clear to me as the case proceeded that the counterclaim must succeed, and that the same considerations which secured its success were fatal to a claim under section 56 (2) of the Patents Act, 1949.

The patents in question stand in the joint names of the company (or the company which it controls) and the respondent, i.e., in the names of employer and employee. It is elementary that, where the employee in the course of his employment (i.e., in his employer's time and with his materials) makes an invention which it falls within his duty to make (as was the case here) he holds his interest in the invention and in any resulting patent as trustee for the employer unless he can show that he has a beneficial interest which the law recognizes. Here the respondent first asserted the " understanding and agreement " to which I have so often referred. It was for reasonable remuneration and nothing else. It failed: there was no " agreement " and " understanding " meant nothing. If it had succeeded, it would still have afforded no defence to the counterclaim, though it might have supported a claim for other relief. Then it was pleaded that the 1942 agreement still governed the situation. This plea too failed, nor, had it succeeded, would it have afforded a defence. Next it was pleaded that it was the intention that the inventions should remain the sole property of the respondent: this plea was wholly inconsistent with the first plea of an agreement for remuneration and does not appear to have been pressed at any stage of the proceedings. Then it was pleaded that the inventions were not made by the respondent in the course of his employment, a plea clearly unsustainable. In this bewildering medley of pleas I find nothing to justify the view that the respondent was not a trustee for the company of his interest in the patents. Ultimately, I think, the argument resolved itself into the proposition that the so-called understanding, though it did not create any legal obligation yet was sufficient to exclude any term of the employment by which inventions made by the employee would belong to the employer. It was not clear what the result of this would be, but, as there is no ground for suggesting that the inventions were to be the exclusive property of the respondent, I can only suppose there would be a deadlock until the parties could come to some agreement. But I think that this argument is based on a radical fallacy.

It is true enough that the rule that inventions made by an employee belong to the employer is sometimes spoken of as an implied term of the contract of service. In a sense, no doubt, it is an implied term in that it is not written out in the contract of service, but it is a term which, given the conditions which are here present, namely, inventions made by the employee in the course of his employment which it was part of his duty to make, the law imports into the contract. It appears to me that it is only an implied term in the same sense that it is an implied term, though not written at large, in the contract of service of any workman that what he produces by the strength of his arm or the skill of his hand or the exercise of his inventive faculty shall become the property of the employer. If the employment is of a designer that which he designs is thus the property of the employer which he alone can dispose of. If it is patentable it is for the employer to say whether it shall be patented, and he can require the employee to do what is necessary to that end. And if it is patented in their joint names, the employee holds his interest as trustee for the employer: see *Adamson* v. *Kenworthy*.[2] If this is, as I think it clearly is, the law, it can only be excluded by an express agreement that it shall be varied and some other legal relationship created. I will not go through the story again, but it appears to me impossible to rely on an understanding, which, vague enough in 1941, had, after it had been superseded by the agreements of 1942, 1943, 1944 and 1945, and after in 1947, the respondent had substantially changed the area of his employment, become so tenuous as to be little more than an aspiration of the respondent that he would receive some recognition beyond his salary for the work that he was paid to do. I find nothing in all this which would justify the court in holding that the ordinary rule governing the relation of master and servant was displaced. I am therefore of opinion that the counterclaim should succeed, subject only to what may be said about section 56 (2) of the Patents Act, 1949.

I turn, then, finally to that section. It may be said, if it has any application to the present case, to afford a defence in this limited sense. It would be a work of supererogation to require the respondent to transfer his interest in the patents to the company if the next step was to be an apportionment involving perhaps a retransfer. But, in my opinion, the subsection has no application. I will assume that the present action and counterclaim were proceedings before the court between an employer and employee, in which its new and special jurisdiction might be invoked. But that jurisdiction only arises if the court is not satisfied that one or other of the parties is entitled to the exclusion of the other to the benefit of an invention. The word "entitled" refers to legal right. The court must therefore determine the legal rights just as it must determine them in any other case, and if the issue is, as it is here, whether one party is entitled to the exclusion of the other, it must decide that question "Aye" or "No" and, having decided it in the affirmative, it is not for the court to say that it is not satisfied. So here, having examined every plea which has been adduced to support the contention that the respondent has some beneficial interest in the patents and rejected them all, the court must declare itself satisfied that the company is entitled, to the exclusion of the respondent, and decline the jurisdiction conferred by the subsection.

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[2] (1931) 49 R.P.C. 57.

It was urged that this construction of the subsection reduces its operation to negligible proportions. This was denied by counsel for the company who gave your Lordships examples of cases where he said the section might still operate. I am not concerned to examine this question, for the scope of the section may be a matter of further debate and I would not prejudice any view of it. It is sufficient to determine, as I do, that it can have no operation in the present case. If, in the result, its scope is less wide than may have been expected, that is not the affair of the courts.

I may add that the construction which I have adopted of subsection (2) is strongly supported by subsection (1), which refers to the "rights," meaning thereby the legal rights, of the parties.

In the result I move that the appeal be allowed and the order of the Court of Appeal discharged, except so far as it relates to costs, and the order of Danckwerts J. restored.

In accordance with the condition imposed upon the granting of leave to appeal, the company will pay the respondent's costs of this appeal.

My Lords, my noble and learned friend, Lord Porter, who is unable to be here, has asked me to say that he concurs in my opinion, and in the motion which I make.

Lord Reid. My Lords, section 56 is a new section in the Patents Act, 1949. It begins by providing a relatively cheap and speedy method for determining disputes between employer and employee. It is, I think, clear that under subsection (1) what has to be determined is the legal right of the parties and that this subsection confers no power to override legal rights or to substitute for a decision on legal rights a determination of what may be thought just or fair in all the circumstances, but it was argued for the respondent that subsection (2) does confer a power to do this.

Subsection (2) cannot be applied at all if the court or comptroller is "satisfied that one or other of the parties is "entitled, to the exclusion of the other, to the benefit of an "invention made by the employee," but if the tribunal is not so satisfied then it has power to apportion the benefit of the invention. The ordinary meaning of the word "entitled" is entitled as a matter of legal right, and even if the word could in some contexts be held to mean fairly or justly "entitled in "all the circumstances" some very cogent reason for so construing it would be required to justify an inference that Parliament intended to take the very unusual course of subordinating the legal rights of the parties to the discretion of the court or the comptroller—particularly as there is no indication of any considerations to which the tribunal should have regard in exercising its discretion. But in the subsection I can see no more than a faint indication that such might have been the intention: to say that a court must be satisfied of something is more appropriate with regard to a matter of fact or opinion than with regard to a matter of legal right. But the phraseology creates no real difficulty if the subsection is held to refer to legal rights alone. The only real difficulty is that on this basis the scope of the subsection is very limited. In the absence of agreement I do not see how there can be a case where the one party is not entitled to the whole benefit to the exclusion of the other, and, if that be right, the subsection can only come into operation if there has been some agreement, express or implied, to share the benefit. And, if there is such an agreement and the subsection gives no authority to override legal rights, the subsection cannot be used to give to either party more or less than that to which the agreement entitles him. It is, I suppose, possible that the apportionment authorized by the section might in some cases afford a convenient method of working out the terms of the parties' agreement "in such manner as the court "or comptroller considers just"; but that is such a small matter that one is tempted to guess that Parliament had some wider intention. But what that intention may have been cannot, in my judgment, be found by any method of construction or interpretation which is open to us. Even if it could be shown that there is no case to which on this interpretation the subsection could apply in practice, I would still find myself unable to discover any other meaning which could properly be given to it.

Accordingly, before the respondent can invoke this subsection he must point to something which would prevent the court from being satisfied that the legal right to the benefit of the inventions with which this case is concerned belongs to the appellants. No doubt the respondent was the inventor and in the ordinary case the benefit of an invention belongs to the inventor. But at the time when he made these inventions he was employed by the appellants as their chief designer and it is, in my judgment, inherent in the legal relationship of master and servant that any product of the work which the servant is paid to do belongs to the master: I can find neither principle nor authority for holding that this rule ceases to apply if a product of that work happens to be a patentable invention. Of course, as the relationship of master and servant is constituted by contract the parties can, if they choose, alter or vary the normal incidents of the relationship, but they can only do that by express agreement or by an agreement which can be implied from the facts of the case. The question in the present case, therefore, is whether there is anything to justify a finding that the parties agreed to alter the normal incidents of the respondent's contract of employment, for it was not disputed that if the ordinary rule applies the patents in question belong wholly to the appellants.

There are cases where it has been said that the employer's right to inventions made by an employee in the course of his employment arises from an implied term in the contract of employment. Strictly speaking, I think that an implied term is something which, in the circumstances of a particular case, the law may read into the contract if the parties are silent and it would be reasonable to do so: it is something over and above the ordinary incidents of the particular type of contract. If it were necessary in this case to find an implied term in that sense I should be in some difficulty. But the phrase "implied term" can be used to denote a term inherent in the nature of the contract which the law will imply in every case unless the parties agree to vary or exclude it. I think that it has probably been used in that sense in the cases founded on by the respondent, and I am of opinion that it is only in that sense that the appellants' right in this case can be said to arise from an implied term.

The respondent therefore could only succeed if he could establish some agreement—express or to be implied—by which the ordinary incidents of his contract of employment were altered. But all that he has to rely on is a so-called "understanding." I do not think that it can be put more favourably for the respondent than that he and the appellants agreed to try to reach agreement about this matter as soon as possible. And in fact they did reach such an agreement in 1942: they agreed that the respondent should receive a "royalty," the patents themselves remaining the property of the appellants. But that agreement was cancelled in 1944, and the new agreement for royalties which was then made did not cover the patents now in question; it only applied to certain other patents. I cannot find any basis for any implied agreement which would give to the respondent any rights in respect of the patents now in question. It appears to me that after the 1942 agreement was cancelled the position with regard to anything not covered by the 1944 agreement was that the ordinary rule inherent in the parties' relationship of master and servant must apply, and therefore the patents in question belong to the appellants and the respondent has no defence to their counterclaim. I therefore agree that this appeal should be allowed.

LORD TUCKER. My Lords, I am in complete agreement with the opinion that has just been delivered by my noble and learned friend on the Woolsack, and would desire to add only a word or two about the judgment of the Court of Appeal.

That court held that the "understanding" of December, 1941, contemplated that any arrangement made would recognize the defendants' right to the benefit of any invention, or patent granted in respect thereof, subject to payment of a sum to be agreed by the defendants to the plaintiff for its use or exploitation, but that, as no agreement was ever reached as to the amount or nature of the payment to be made, the defendants—apart from section 56—would be entitled in accordance with the ordinary implication to the benefit of the inventions and patents without any obligation to make any payment in respect thereof to the plaintiff, since the court—apart from section 56—could not impose upon the parties terms to which they had never agreed. The court, however, reached the conclusion that section 56 gave them this jurisdiction. They said[3]: "It seems "to us that the language of the subsection necessarily implies

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[3] (1953) 71 R.P.C. 61, 75.

"that there may be cases in which the court may not be "satisfied that the benefit of a disputed invention belongs to "one of the parties to the exclusion of the other, although there "is no agreement between them defining the proportions or "manner in which such benefit is to be shared."

For the reasons which have been stated by my noble and learned friend, I am unable to accept an interpretation of section 56 which would enable the court—in the absence of express agreement—to vary the terms which the law imports into the contract of service between master and servant.

LORD SOMERVELL OF HARROW. My Lords, I agree.

Appeal allowed.

Solicitors: *Cosmo Cran & Co.; Gedge, Fiske & Co.*

[HOUSE OF LORDS.]

CARMARTHENSHIRE COUNTY COUNCIL . APPELLANTS;

AND

LEWIS . . . . RESPONDENT.

H. L. (E.)*
1955
Jan. 24, 25, 26:
Feb. 17.

Negligence—Child—Cause of injury—Straying from school onto highway —Driver killed in avoiding him—Liability of education authority. Negligence—Duty of care—Extent. Onus of proof—Res ipsa loquitur.

A four-year-old boy attending a nursery school under the management of the appellant council as education authority strayed from the premises onto a public highway, and the respondent's husband, who was driving a lorry, struck a telegraph post in avoiding him and was killed. The respondent sued the council for damages, alleging that the death was caused by their negligence or that of the teacher who had left the child temporarily unattended:—

Held (*per* Lord Goddard, Lord Reid, Lord Tucker and Lord Keith of Avonholm, Lord Oaksey dissenting), that the appellant council were liable to the respondent in damages, since the unexplained fact that in the temporary absence of the teacher (who, on the evidence, was not negligent) it was possible for so young a child to wander from the school premises onto the highway, through a gate which was either open or very easy for him to open, disclosed negligence on their part.

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* *Present*: LORD OAKSEY, LORD GODDARD, LORD REID, LORD TUCKER and LORD KEITH OF AVONHOLM.

Held, unanimously, that an analogy with the law relating to liability for animals straying on the highway was inapplicable, so that there was a duty on the occupiers of premises adjoining the highway not negligently to allow young children to escape onto it so as to endanger other persons lawfully upon it.

Per Lord Oaksey. In the courts below the case was argued and decided entirely on the question of the alleged negligence of the teacher and, since she was now held not to have been negligent, the appeal should succeed.

Bourhill v. *Young* [1943] A.C. 92; [1942] 2 All E.R. 396 applied.

Decision of the Court of Appeal (sub nom. *Lewis* v. *Carmarthenshire County Council*) [1953] 1 W.L.R. 1439; [1953] 2 All E.R. 1403 affirmed.

APPEAL from the Court of Appeal (Somervell, Denning and Romer L.JJ.).

This was an appeal from an order of the Court of Appeal dated November 13, 1953, after a hearing on November 9 and 10, 1953, affirming an order made by Devlin J. at Cardiff Assizes on March 31, 1953, after a hearing at Carmarthen Assizes on March 6, 1953, in an action in which the appellants, Carmarthenshire County Council, were defendants and the respondent, Mrs. Dilys Eileen Lewis, widow, was plaintiff.

The facts summarized from their Lordships' opinions were as follows: It was admitted that the respondent's husband lost his life through no fault of his own. He was driving a lorry along a busy street, College Street, Ammanford, when David Morgan, then a week or so short of his fourth birthday, ran into the road. The driver swerved to avoid him and in consequence the lorry struck a telegraph pole on the edge of the pavement. There was no suggestion that the driver, who was killed, did not take the right course in trying to save the child or that he could have avoided the accident. It was not disputed that the cause of his death was the action of the child.

The appellants were the local education authority. Adjoining College Street they had a school in which there were three departments: a junior school for children from seven to 11 and over, an infants' school for children between five and seven and a nursery school for children from three to five. Nearest the street there was a playground for the juniors. Behind that there was the junior school building. Behind that again was a playground for the infant school. Furthest from the street was the building in which the infant school and the nursery school were conducted.

There was an enclosed playpen adjoining the nursery school for the children under five. There were only two entrances to the school, a gate from the street for the juniors and a gate from the infants' playground for the others. This gate gave access to a small lane which ran from the street 50 yards away along the side of the school.

David Morgan, who was described as obedient, had been attending the nursery school for about a year before the accident. He was brought there every morning by his mother and taken home by her in the afternoon. He had never left the school by himself. At about 12.15 p.m. each day, after the midday meal, the children in the nursery school went into the playpen, where they were watched by one of the mistresses. The nursery school was under the charge of Miss Morgan (who was not related to the child David) and at this time of day she often took two of the children for a short walk into the town. On April 19, 1951, she was going to take out David and a girl, Shinoa Evans, and they got their hats and coats on. Then Miss Morgan went out of the classroom to go to the lavatory and get ready to go out, intending to be away for a very short time. But she found that one of the other children had fallen and cut himself, and she stopped to wash and bandage the cut. This occupied about 10 minutes and then she thought that she ought to take this child to the room of the headmistress to see whether a doctor should be called. The room of the headmistress was on the other side of the nursery classroom. When she entered the nursery classroom she found that the other two children had gone.

There was no evidence where Shinoa went, but David must have crossed the infants' playground, gone through the gate into the lane and gone down the lane and about 100 yards along the street to the place where the accident happened. After the accident he must have been brought back by someone, because Miss Morgan found him outside the classroom in a small vestibule which was open to the infants' playground.

When Miss Morgan left the children in the classroom the door of it was shut and two girls of about nine from the junior school were there. After their time in the playpen the nursery children came into the classroom and slept for a time on some kind of mattress beds on the floor and the two older girls were laying these out when Miss Morgan left. They were not there when she returned. They were not called as witnesses and there was no evidence when they left nor how long Miss Morgan expected them to stay. As she expected to be away only for a very short time, she gave them no instructions about looking after David and Shinoa, although she said in evidence that she relied on them.

Miss Morgan said in evidence that the latch on the classroom door was so low that it could be opened by the nursery children. At the relevant time there was no one in the infants' playground but there were juniors in the front playground.

Miss Morgan's evidence as to the gates, given in answer to questions by Devlin J., was as follows:

"Q. Can children aged five to seven operate the latch of the "gate into the lane? A. Yes.

"Q. There is a latch to the gate into the lane, is there? "A. Yes.

"Q. Is there a latch to the gate into the highway, or is it "the fact you can open it just by pulling it? A. By just pulling "it.

"Q. And it is a fact, is it, that you can get from the infants' "yard to the main school yard? A. Yes, my Lord.

"Q. Are those gates ever kept locked during the play hours "when the five to seven's are out? A. Yes.

"Q. They are? A. Yes, they are locked.

"Q. Always? A. No, not always.

"Q. When are they kept locked and when are they not? "A. The headmistress has charge of them.

"Q. That is why I thought perhaps you might not know "about it. You know that they are sometimes locked, do you? "A. Yes.

"Q. Generally locked, would you say? A. Yes.

"Q. From your observation, they are generally but not "always. But you cannot say, because you were not in charge "of it, on what system they are kept locked or unlocked? "A. No, my Lord.

"Q. One or other of them must, of course, have been "unlocked on this occasion? A. Yes.

"Q. And you cannot say which? A. No.

"Mr. Gerwyn Thomas.—Was the witness referring to both "gates when she said they might be locked? Was she referring "to the main gate and the lane gate or not, when she said they "were locked during playtime? A. The lane gate.

"Q. Not the other? A. No.

"Devlin J.—What about the main gate then? A. No.

"Q. Is it never locked? A. No."

Subsequently the headmistress was called by the appellants to correct Miss Morgan's evidence and said that the lane gate was closed but never locked. No questions were put to her as to why the gates were not locked.

The respondent brought this action for damages under the Fatal Accidents Acts, claiming that the death of her husband was occasioned by the negligence of the appellants or their agents. Devlin J., holding that Miss Morgan was negligent, gave judgment for the respondent for £3,037 19s. 6d. with costs. The Court of Appeal affirmed his decision. The appellants appealed to the House of Lords.

H. V. Lloyd-Jones Q.C. and *Norman Richards* for the appellants. The appellants did not owe any duty in respect of this child to users of the highway near the school, as distinct from their duty to the child and its parents. Thus, even assuming that they were negligent in letting it escape into the street, they were not responsible for the damage caused to others by its behaviour. Further, even assuming that the appellants owed a duty to the deceased, they were not liable in respect of his death because it could not reasonably have been foreseen that if a child of this age were left in a classroom for a short time it would get out into the street and cause an accident. Thus the death of the deceased was too remote a consequence of the negligence to involve liability by the appellants. Putting oneself in the position of the hypothetical careful parent one might anticipate, because of the child's tender years, that it might come to harm, but one would not anticipate that it would cause an accident. It is recognized that the driver of a vehicle in a busy thoroughfare in a town must drive in such a way as to anticipate every contingency involving and including acts of folly. This was a case, not of a child taken out into the street but of a child left in a room where it was accustomed to be left. In law there is no justification for the alleged duties which are the foundation of the judgments in the courts below. If their decision is right, then the householder who leaves a child alone for 10 minutes is in peril in case it should escape into the street. The child would have to be locked up or tied to its parents' apron-strings. An impossible burden would be put on harassed housewives to keep a constant watch. It would not be possible to treat the position of an education authority as something apart. This decision would affect every parent. The reasoning in *Bourhill* v. *Young* [1] assists the appellants. It contains passages which justify a distinction between the duty which might be owed to any person in the streets and the plain and obvious duty owed to the child itself. *Bolton* v. *Stone* [2] is also relied on in that it supports the contention that it is likelihood of injury which must be uppermost in the mind. Thus, although in the present case the injury to the deceased might be foreseeable as a possible consequence of the child's escape, that possibility was so remote that a reasonable person would not have anticipated it. Accordingly, the appellants are not liable. *Haynes* v. *Harwood* [3] does not help in this matter, nor does *Lynch* v. *Nurdin*.[4] A child of eight might be more likely to cause such damage as was suffered here than a child of four, yet it could not be said that such a child should not be allowed out alone. If no one had come to fetch this child home there would have been no obligation on the school authorities out of school hours to take the child home, so far as any duty to the deceased was concerned, though doubtless someone would have seen it home, since the duty of a school authority towards a child is that of a careful parent: *Williams* v. *Eady*.[5] But the duty owed to the public is not the same as that owed to the child. On this point there is an analogy to the case of animals on the highway and on that analogy the appellants are not liable: see *Brackenborough* v. *Spalding Urban District Council* [6]; *Deen* v. *Davies* [7]; Salmond on Torts, 11th ed., p. 669; *Wright* v. *Callwood*,[8] and *Tillett* v. *Ward*.[9] There is no case where a dog being allowed on the highway has given rise to an action. Miss Morgan was not negligent in leaving these children alone for 10 minutes. There was no negligence in connexion with the gate. *Ricketts* v. *Erith Borough Council* [10] is relevant because there was there an unlocked gate at a school for children between five and 10 and no one thought there could be any negligence in leaving it unlocked.

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[1] [1943] A.C. 92, 98, 100, 100–1, 104, 105, 107; [1942] 2 All E.R. 396.

Norman Richards following. The test of liability is what a reasonable person would have anticipated as probable. One must assume a reasonable person in possession of all the facts known to Miss Morgan. It is admitted that the greater the risk of serious injury, the greater must be the care: see *Paris* v. *Stepney*

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[2] [1951] A.C. 850, 863, 864; [1951] 1 T.L.R. 977; [1951] 1 All E.R. 1078.

[3] [1935] 1 K.B. 146, 152; 51 T.L.R. 100.

[4] (1841) 1 Q.B. 39.

[5] (1893) 10 T.L.R. 41, 42.

[6] [1942] A.C. 310, 314, 315, 317; 58 T.L.R. 104; [1942] 1 All E.R. 34.

[7] [1935] 2 K.B. 282; 51 T.L.R. 398.

[8] [1950] 2 K.B. 515, 526; 66 T.L.R. (Pt. 2) 72.

[9] (1882) 10 Q.B.D. 17.

[10] (1943) 113 L.J.K.B. 269; [1943] 2 All E.R. 629.

Borough Council.[11] But what happened here was something which had been only a bare possibility, and a reasonable person would not have anticipated that an apparently obedient child would do all the things that this child did. The onus of proof is not on the defence. There is no rule of law that the presence in the street of a child of tender years must be explained. But, in any event, the explanation given by Miss Morgan was sufficient, and even if an onus rested on the appellants that explanation put it on the respondent. In the case of the duty vis-à-vis a child at home the equivalent test would be whether a reasonable parent going into the kitchen and leaving the child in the hall or living room for 10 minutes would have expected it to go further than the garden. Similarly Miss Morgan should not have foreseen, save as a vague possibility, the chance of this child doing what it did. If the decision of the Court of Appeal is right, every parent of a child of four is responsible for any accident caused if the child escapes onto the highway. A parent or teacher has never been held liable for an accident resulting from a child being on the highway, although drivers of vehicles must often have been injured through children running out in front of them. The reason is that no one has ever supposed that such an action would lie, the child being beyond the immediate charge of the parent or teacher. This negatives the existence of a duty to the deceased in the present case. Because of this hundreds of children are constantly left in parks with unlocked gates. Even if a person brings a child onto the highway and then takes no care of it he will not be held liable for damage to a third party resulting from its behaviour. A careful parent would never contemplate that a child which escaped from a school as this child did would cause damage to other persons. It might be otherwise if the child was known to have crossed busy roads previously. That might be analogous to scienter. A reasonable school teacher's conduct must be looked at in all the circumstances of the case.

H. Edmund Davies Q.C. and *D. Geoffrey Jennings* for the respondent. On the face of it an explanation is required why Miss Morgan left this child alone. The matter may be tested by the following propositions: (1) The appellants were under a duty to exercise reasonable care in the supervision of the child during school hours. (2) That duty they owed to all such persons as they could reasonably foresee might be injured by a failure to exercise reasonable care: *Bourhill* v. *Young*.[12] (3) The appellants ought reasonably to have foreseen as a possible consequence of a breach of that duty that the child would escape onto the highway and there become an innocent peril. (4) The appellants ought reasonably to have foreseen that those who saw the peril in which the child was placed would be likely to take steps to rescue it, even though by so doing they endangered their own safety: *Haynes* v. *Harwood.*[13] (5) A duty was accordingly owed, not merely to the child but to all who at the moment when the danger materialized might happen to be on or near the highway.

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[11] [1951] A.C. 367; [1951] 1 T.L.R. 25; [1951] 1 All E.R. 42.

[12] [1943] A.C. 92, 98.

There was failure by the appellants to exercise reasonable supervision over the boy and as a foreseeable and direct consequence of that breach of duty he escaped onto the highway and ex concessis the deceased was killed as a result of a successful attempt to avoid a collision with him. His death was caused by the appellants' failure to discharge the duty they owed to him.

If the child had been run over the appellants would not have been held free from blame: see *per* Denning L.J. in the Court of Appeal.[14] It would be shocking if the child and the driver, who had done nothing wrong, had both been injured and, both having brought an action, the appellants had been held liable to the child but not to the driver. The House of Lords should strain against a result of that kind. The law relating to animals on the highway may produce unsatisfactory results but one should not extend them to the law relating to children. In *Searle* v. *Wallbank*[15] it was held that an occupier was under no liability to fence his land so as to prevent his domestic animals from escaping onto the highway, but children cannot be identified with animals. As to the special difficulties arising in connexion with the fencing in of animals, see *per* Viscount Maugham.[16] In the law of negligence, assuming that a duty exists, there is no difficulty in defining that duty in a way intelligible to the ordinary man. Such a duty in relation to animals might be defined as a duty to take reasonable care to keep them in. Then it would be open to the court to consider the facts of each case, e.g., in the case of a dog, its age and its habits. At present the law says that the dog's owner is not liable if it strays on the highway. In the law of negligence that is an exception and an anomaly, and anomalies are a subject of regret and not of extension.

If it be said that there is no duty to road users in relation to the child in this case, then the child could be left alone for hours on end without any liability arising. But one must draw the line where the good sense of a jury would draw it. There is a duty on the parents of a young child to take reasonable care to prevent it from straying, and on the particular facts of this case that duty was broken by the appellants, who likewise owed it.

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[13] [1935] 1 K.B. 146.

[14] [1953] 1 W.L.R. 1439, 1443–4; [1953] 2 All E.R. 1403.

[15] [1947] A.C. 341; 63 T.L.R. 24; [1947] 1 All E.R. 12.

[16] [1947] A.C. 341.

There is a series of cases relating to animals on the highway and in some of the judgments there is a note of regret because it is unfortunate in modern conditions that the courts should be prohibited from investigating whether there has been a failure to take reasonable care. But the duty in relation to a child is one of reasonable care. If children and animals were in exactly the same legal position the respondent could not succeed, but the anomaly should not be extended. As to the law relating to animals on the highway, see *Deen* v. *Davies*[17]; *Wright* v. *Callwood*[18]; Law Quarterly Review (1936), vol. LII, p. 9, and (1950), vol. LXVI, p. 456.

It is not correct to say that a careful parent might reasonably have foreseen injury to the child but not to a road user. One is here dealing with a school authority which should constantly have regard to the safety of road users, nor is it conceded that a parent should not have regard to it too. The standard of care must obviously be very high. The greater the injury which may be sustained, the greater the precautions which should be taken. One must have regard to the gravity of the possible damage: *Paris* v. *Stepney Borough Council.*[19] The proximity of a road with heavy traffic involved risk of very great damage to the child or to a road user, particularly in view of the extreme youth of the child, a tiny tot.

In view of these facts and of the fact that all the doors were unlocked and no one was on guard at the material time there was negligence on the part of Miss Morgan and of the appellants. The House of Lords should be slow to interfere with the finding of the trial judge. [*Bolton* v. *Stone*[20] and *Haynes* v. *Harwood*[21] were also referred to.]

D. Geoffrey Jennings following. As to *Searle* v. *Wallbank*,[22] domestic animals are of their nature to be expected on the highway, but a child of tender years is not expected to be found on the highway. In the last resort a driver would have less regard to the safety of an animal which he encountered on the highway than of a child and so he himself would be in greater danger in trying to avoid the child.

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[17] [1935] 2 K.B. 282.
[18] [1950] 2 K.B. 515.
[19] [1951] A.C. 367.
[20] [1951] A.C. 850, 861, 867.
[21] [1935] 1 K.B. 146.
[22] [1947] A.C. 341.

H. V. Lloyd-Jones Q.C. in reply. The proper test is to be found in *Bolton* v. *Stone.*[23] It has never occurred to reasonable people that one could fix liability for an accident on the parents of a child because the child was on the highway. The law has never gone so far as to develop a doctrine of scienter in regard to children. The analogy of animals is not disclaimed, but this case is a fortiori. No one could be held liable for an accident because his dog ran into the road, and the case of a child is stronger.

Their Lordships took time for consideration.

Feb. 17. LORD OAKSEY [having stated the facts, continued:] My Lords, in these circumstances, Devlin J. and the Court of Appeal have held that Miss Morgan was negligent in leaving David and that her negligence caused the accident to the respondent's husband. I should agree that, if Miss Morgan was negligent, her negligence was causally connected with the accident. If a child of under four years, who is in the charge of a schoolmistress, is negligently allowed by the schoolmistress to stray into a crowded street, I am of opinion that the negligence is causally connected with an accident caused by the child. But I do not think that Miss Morgan's conduct was negligent. The standard of care which the law demands is the standard which an ordinarily prudent man or woman would observe in all the circumstances of the case. Devlin J. appears, in my opinion, to have disregarded what Miss Morgan said as to her reasons for not returning immediately to the two children. He said: "If the case had been that the "child was hurt sufficiently badly to give rise to a degree of "alarm that drove from Miss Morgan's mind the other calls "upon her, or to put her into the position of having to choose "between two duties, both of which she could not adequately "perform, I should have felt gravely handicapped by lack of "material. But I think it emerged quite clearly from Miss "Morgan's evidence that the defence was not that."

But, in my opinion, that was exactly what the defence was. Miss Morgan said that she bandaged the child who was hurt and took him to the headmistress to see if he should be taken to the doctor as she did not know whether the cut he had was very serious. The headmistress was called by the appellants, but was asked no question by the judge or the plaintiff's counsel on this matter. Doubtless Miss Morgan might have taken other steps: she might have told David that she would only be a few minutes, or have asked the mistress in the playpen to keep an eye on him, but she knew David to be an obedient child who had been under her care for a year and she knew that he and the little girl were waiting, dressed up to go out with her for a treat. The learned judge said that they were "dressed up with nowhere "to go. . . ." But they were going out with Miss Morgan, and I should have thought that that was exactly what would have made them wait for the mistress who had promised to take them out for a treat.

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[23] [1951] A.C. 850, 858.

In such circumstances it appears to me perfectly natural that Miss Morgan would never have thought that the children would wander out of the school into the yard, much less go out through the gate into the lane. As she said, they were trained children who had been in the school for over a year. Devlin J. appears to have formed a somewhat unfavourable opinion of Miss Morgan because of her evidence about the gates out of the yards.

Both the courts below have based their judgments on the negligence of Miss Morgan, but some of your Lordships are of opinion that, though Miss Morgan was not negligent, yet the appellants were negligent for allowing the gate into the lane to be left unlocked. It is true to say that in particulars delivered on October 20, 1952, it was alleged that "one of the mistresses ". . . failed to see that the gates leading from the school "premises to the highway were closed." But the case was not fought on this issue. In fact the gates were closed but not locked. No question was asked of the headmistress as to why the gates were not locked. None of the judges who has heard the case has based his judgment on an obligation on the appellants to keep the gates locked and the matter is not relied upon in any of the reasons to the respondent's printed case.

I think, therefore, that the case ought to stand or fall upon the issue of Miss Morgan's conduct, and, in my opinion, it cannot be decided in favour of the respondent without inferentially holding that education authorities are bound to keep children under constant supervision throughout every moment of their attendance at school, which, in my opinion, is to demand a higher standard of care than the ordinary prudent schoolmaster or mistress observes.

An analogy between the law as to the liability of owners of animals on highways was discussed in your Lordships' House;

but although there are certain similarities between children of tender years and animals, I think that the law as to straying animals is based upon the way in which animals have been kept from time immemorial and the impossibility of keeping them under control in all circumstances, and that there is no true analogy. For these reasons I would allow the appeal.

LORD GODDARD. My Lords, I need not reiterate the facts of this somewhat difficult case. The question of general importance that is raised is whether there is a duty on the occupiers of premises adjoining a highway to prevent young children from escaping on to the highway so as to endanger other persons lawfully passing upon it. By "young" children I mean those of such tender years that they may be presumed to be unable to take any care for their own safety and whom a prudent parent would not allow to go into a street unaccompanied. A long series of cases, culminating in *Searle* v. *Wallbank*,[1] have established, now beyond controversy, that an occupier is under no duty to fence his fields, yards or other premises so as to prevent his cattle or other domestic animals from escaping on to the highway, though by so doing danger, and it may be disaster, is caused to passers-by. If, then, an occupier is not liable for the escape of an animal, is he to be held liable for that of an infant, who from the standpoint of reasoning powers is much the same as a sheep or any other domestic animal? Now, once a doctrine has become a rule of law it is the duty of the courts to apply and follow it without regard to its origin, but if to follow it would be to extend it, in my opinion it is not only legitimate but essential to examine the origin and reason for it if it be known. How some rules of law arose is not always known. For instance, except for the fact that in 1799 Lord Kenyon C.J. laid it down categorically in *Merryweather* v. *Nixan*[2] that there was no contribution between joint tortfeasors, no one has ever discovered whence the rule came, but it remained the law till abrogated by the Law Reform (Married Women and Tortfeasors) Act, 1935. But how the rule your Lordships have to consider arose is, I think, known, its origin having been explained particularly by Viscount Maugham L.C. in *Searle* v. *Wallbank*[3] and in *Heath's Garage Ld.* v. *Hodges*[4] in the judgment of Neville J. It arose because at least most of the roads in this country originated over unenclosed country when the open field system of farming prevailed and long before fencing became usual, and to this day hundreds of miles of roads run through unenclosed land, so cattle, sheep and all domestic animals could and still do wander on and over such roads, and the presence of domestic animals was not regarded, to use the words of Neville J.,[5] as inconsistent "with the reasonable safety of the public "using the road." Whether this doctrine should prevail in these days of swift-moving motor traffic, at least in the case of roads in enclosed country, is for the legislature to consider, but it has never been applied to the presence on the roads of human beings of whatever age, nor to an inanimate object. Perhaps the simplest way of accounting for the rule is that dedication of roads, at least in country districts, must be presumed to have been sub modo, subject, that is, to the possible presence of domestic animals upon them. How far the doctrine applies in towns or populous places may, I think, still be considered a debatable question. Having regard, then, to its origin, it would, in my opinion, be unwarrantable to extend it to the facts of the present case.

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[1] [1947] A.C. 341; 63 T.L.R. 24; [1947] 1 All E.R. 12.

[2] (1799) 8 Term Rep. 186.

[3] [1947] A.C. 341.

[4] [1916] 2 K.B. 370; 32 T.L.R. 570.

The position, then, is that the appellants maintain a nursery and infant school in premises adjoining a highway in a town and are, in my opinion, under a duty to take care that the children themselves neither become involved in nor cause a traffic accident. At the trial the principal matter relied on as establishing negligence was that this child and one other were left unattended by the teacher in charge for a short time, during which they got out of the school grounds. The learned trial judge thought it a borderline case, as did Somervell L.J., but on the whole found the teacher was negligent. This is an inference drawn from the facts found by the learned judge and, in my opinion, is open to review by your Lordships, who, accepting the facts so found, are in as good a position as the courts below to determine whether they justify holding Miss Morgan guilty of a want of care. Reluctant as I must be and am to differ on such a matter, I cannot hold that an inference of negligence on her part should be sustained. Her duty was that of a careful parent. I cannot think that it could be considered negligent in a mother to leave a child dressed ready to go out with her for a few moments and then, if she found another of her children hurt and in need of immediate attention, she could be blamed for giving it, without thinking that the child who was waiting to go out with her might wander off into the street. It is very easy to be wise after the event and argue that she might have done this or that; but it seems to me that she acted just as one would expect her to do, that is to attend to the injured child first, never thinking that the one waiting for her would go off on his own. The utmost length of time she was out of the room was 10 minutes, but it is plain that the child must have gone off very soon and I should think almost immediately after Miss Morgan had gone to the lavatory. He had to go from the room, across the playground, out into the side lane, down to the main road and then some way along the latter, cause the accident and be brought back to the place from which he started, there to be seen by Miss Morgan, all within this short space of time. And this was a child described as obedient and who had never before left the school by himself as he was always fetched by his mother. I cannot bring myself to lay the blame for this tragic accident on Miss Morgan.

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[5] [1916] 2 K.B. 370, 382.

But this does not conclude the matter as far as the appellants are concerned. They maintain a nursery school and an infant school on these premises. In the former they accept the care of children from three to five years and in the latter those of five to seven. During the time when this child was in their care he is found outside the school premises wandering in the street. That, in my opinion, clearly calls for an explanation from the appellants. They have only shown that the child left the room in the temporary absence of the teacher and so got into the playground. In the playground he would have been safe at least from traffic risks. All we know is that the gates must have been open or so easy to open that a child of three or four could open them. True the nursery children are put, when out of school into the playpen, but infants from five to seven play in the playground. If it is possible for children of that age, when a teacher's back may be turned for a moment, to get out into a busy street this does seem to indicate some lack of care or of precautions which might reasonably be required. There is no analogy between a school playground and the home in this respect. At any rate no satisfactory explanation has been given for this child being found in the street at a time when he was in the care of the appellants, and for this reason I would dismiss the appeal.

Lord Reid. My Lords, it is admitted that the respondent's husband lost his life through no fault of his own. He was driving a lorry along a busy street when a child of four ran onto the road. He must have swerved to avoid the child and, in doing so, his lorry struck a telegraph post at the edge of the pavement and he was killed. There is no direct evidence about the matter, but there is no suggestion that he did not take the right course in trying to save the child or that he could have avoided the accident. Just how the accident happened is immaterial. It is not disputed that the cause of his death was the action of the child. Of course the child was not old enough to be responsible, and if a child of four is alone in a busy street it is quite likely to do what this child did. This action is brought by the driver's widow, who is the respondent, against the appellants, in whose charge this child was when it got onto the street.

[His Lordship stated the facts and continued:] In these circumstances, two questions arise for decision. In the first place, was the escape of the child David into the street attributable to negligence of the appellants or of those for whom they are responsible? If it was, then it appears to me to be obvious that his being there alone might easily lead to an accident, and if the child had been killed or injured the appellants would have been liable in damages, for they certainly owed a duty to the child to protect him from injury. But then a second question is raised by the appellants. They say that, although they owed a duty to the child, they owed no duty to other users of the highway, and that even if they were negligent in letting the child escape onto the street they cannot be held responsible for damage to others caused by the action of the child when there.

On the first question I am of opinion that the appellants were negligent. However careful the mistresses might be, minor emergencies and distractions were almost certain to occur from time to time so that some child or children would be left alone without supervision for an appreciable time. The actions of a child of this age are unpredictable, and I think that it ought to have been anticipated by the appellants or their responsible officers that in such a case a child might well try to get out onto the street and that if it did a traffic accident was far from improbable. And it would have been very easy to prevent this, and either to lock the gates or, if that was thought undesirable, to make them sufficiently difficult to open to ensure that they could not be opened by a child so young that it could not be trusted alone on the street. The classroom door was not an obstacle, and no doubt it was convenient that the children should be able to open this door themselves, but that meant that the way to the street was open unless the outer gate was so fastened or constructed as to be an obstacle to them.

There was much argument whether Miss Morgan was negligent in leaving these children for 10 minutes. I do not think that she was negligent in the first instance because she intended to come back very soon; the real question is whether, when she found that she had to be absent to attend to the injured child, she ought to have paid some attention to the two who were waiting for her. She was next door to the classroom while attending to the injured child and, without delaying her attention to the injured child, she could have called to David and Shinoa to come into the playpen where they would have been under supervision, or at least she could have opened the door of the classroom to see that all was well. But no doubt her whole attention was concentrated on the injured child, and the question whether her omission to give any attention to the other children amounted to negligence is, I think, a very narrow one. I prefer to base my judgment on the fact that such a situation ought to have been anticipated by the appellants and provided for.

The appellants argued that even if they were negligent and even if they owed some duty to the deceased lorry driver, the accident which caused his death was not reasonably foreseeable; his death, if it was a consequence of their negligence, was too remote to involve them in liability for it. I would deal with that argument in this way. Was it foreseeable by an ordinary reasonable and careful person that a child might sometimes be left alone in the nursery school for a short period? I think it was. I see nothing very extraordinary in the circumstances which caused these children to be left alone. Was it, then, foreseeable that such a child might not sit still but might move out of the classroom? If I am right in my view that it is not safe to make assumptions about the behaviour of such young children, again I think it was. Was it, then, foreseeable that such a child might go into the street, there being no obstacle in its way? I see no ground for assuming that such a child would stay in an empty playground when the gate was not more than 20 yards or so from the classroom. And once the child was in the street anything might happen. It was argued that it might be reasonable to foresee injury to the child but not reasonable to foresee that the child's action would cause injury to others. I can see no force in that; one knows that every day people take risks in order to save others from being run over, and if a child runs into the street the danger to others is almost as great as the danger to the child.

Then *Bolton* v. *Stone*[6] was cited, and it was said that although injury to the driver of a vehicle in the street might be foreseeable as a possible consequence of the escape of the child it was not reasonably probable and, therefore, the appellants are not liable. But, in my view, *Bolton* v. *Stone*[6] establishes that if an event is foreseeable the antithesis of its being reasonably probable is that the possibility of its happening involves a risk so small that a reasonable man would feel justified in disregarding it, and I cannot believe that, if anyone had realized that the result of having a gate so easy to open might be a serious accident in the adjoining road, he would have thought it right to disregard that risk and do nothing.

I turn now to the second question, which is one of novelty and general importance. If the appellants are right it means that no matter how careless the person in charge of a young child may be, and no matter how obvious it may be that the child may stray into a busy street and cause an accident, yet that person is under no liability for damage to others caused solely by the action of the child because his only duty is towards the child under his care. There appears to be no reported case of an action of this kind, and the appellants say that this indicates that no one has hitherto supposed that such an action would lie, for there must have been many instances of the driver of a vehicle suffering damage caused by a young child running in front of it. But in most cases of that kind it would not be worth while to sue the person who was in charge of the child, and in any event "the categories of "negligence are never closed."

The case most relied on by the appellants was *Bourhill* v. *Young*,[7] where it was held that a motor-cyclist was under no duty to a woman who was not in any physical danger from his driving and who did not even see the accident in which he was involved but who suffered shock from hearing the noise of it. Those facts have not the faintest resemblance to the facts of this case, but the appellants say that the reasoning with regard to remoteness assists them. I do not think that it does. Lord Thankerton said[8] that the cyclist's duty was to drive "with such reasonable "care as will avoid the risk of injury to such persons as he can "reasonably foresee might be injured by failure to exercise such "reasonable care," and he referred to "the area of potential

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[6] [1951] A.C. 850; [1951] 1 T.L.R. 977; [1951] 1 All E.R. 1078.

[7] [1943] A.C. 92; [1942] 2 All E.R. 396.

[8] [1943] A.C. 92, 98.

"danger." Lord Russell of Killowen[9] cited the well-known passage in the speech of Lord Atkin in *Donoghue* v. *Stevenson*,[10] beginning "Who, then, in law is my neighbour?", as did Lord Porter.[11] Lord Macmillan said[12] that a "duty is owed to those "to whom injury may reasonably and probably be anticipated if "the duty is not observed," and Lord Wright[13] referred to the "general concept of reasonable foresight as the criterion of negli-"gence or breach of duty." If I am right in the view which I have already expressed that injury to other road users was reasonably foreseeable if this child was allowed to escape onto the street, then the reasoning in *Bourhill* v. *Young*[14] is very much against the appellants and they could only succeed on this argument if there were in connexion with the care of young children some special feature which would prevent the application of the general principle.

The appellants say that it would be unreasonable to apply that principle here because if such a duty is held to exist it will put an impossible burden on harassed mothers who will have to keep a constant watch on their young children. I do not think so. There is no absolute duty; there is only a duty not to be negligent, and a mother is not negligent unless she fails to do something which a prudent or reasonable mother in her position would have been able to do and would have done. Even a housewife who has young children cannot be in two places at once and no one would suggest that she must neglect her other duties, or that a young child must always be kept cooped up. But I think that all but the most careless mothers do take many precautions for their children's safety and the same precautions serve to protect others. I cannot see how any person in charge of a child could be held to have been negligent in a question with a third party injured in a road accident unless he or she had failed to take reasonable and practicable precaution for the safety of the child.

What precautions would have been practicable and what precautions would have been reasonable in any particular case must depend on a great variety of circumstances. But in this case it was not impracticable for the appellants to have their gate so made or fastened that a young child could not open it, and, in my opinion, that was a proper and reasonable precaution for them to take.

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[9] [1943] A.C. 92, 101.

[10] [1932] A.C. 562, 580; 48 T.L.R. 494.

[11] [1943] A.C. 92, 117.

[12] Ibid. 104.

[13] Ibid. 107.

[14] [1943] A.C. 92.

Finally, it was urged that the general principle should not apply here because it does not apply where animals stray onto a highway, and young children, unable to appreciate danger, have some resemblance to domestic animals. But this analogy seems to me to be misleading. It is true that a person who keeps domestic animals is not bound to prevent them from straying onto a road or responsible for the consequences if they do stray; but the reason for that appears to be that a person is entitled to keep his animals on open or unfenced ground from which they can stray onto a road, and it has become a rule of law that he is not bound to do anything to prevent them from straying. That reason has no application to children, and I do not see why the rule of law which has grown out of it should apply to them either. Moreover, a person who brings his animal onto a road or street and then negligently fails to look after it there is not free from liability. Counsel for the appellants did not argue that this rather illogical distinction should be applied to children, and it would be strange if a person in charge of a child were under a different duty according to whether he let the child stray from his house or garden or took the child onto the road and then let it stray there. Counsel took the only logical course and argued that even if a person takes a child into the street and then takes no care of it he cannot be held liable for damage suffered by a third party as a result of its actions, and that argument gains no support from the rules which apply to animals.

I am therefore of opinion that the appeal should be dismissed.

LORD TUCKER. My Lords, during the course of this appeal the question was raised whether the appellant council owed any duty in respect of the children in its charge to users of the highway adjoining the school premises as distinct from their duty to the child or its parents, and in this connexion reference was made to the law with regard to animals.

My Lords, I am satisfied that the animal cases are in no way analogous and afford no guidance in the present appeal. I think that in principle there can be no doubt that both courts below were right in holding that persons in charge of tiny children (the child in question was just under four years of age) in premises adjoining a busy highway owe a duty to persons using the highway to take reasonable care to see that such children—being of an age when they cannot have acquired sufficient "road sense" to permit of their being allowed to travel unattended to and from school—shall not during school hours escape unattended onto such a highway, it being reasonably foreseeable that an accident involving injury to other road users as well as to the children may well result therefrom.

In the present case a child named David Morgan, a week or so before his fourth birthday, had been taken to the nursery school managed by the appellant council at Ammanford and left there in charge of the school authorities. Between 12.15 and 12.30 p.m. during school hours the child had somehow got out into College Street—a busy thoroughfare—and caused an accident which resulted in the death of the respondent's husband.

My Lords, such an occurrence I think calls for an explanation from the appellants. Not because the facts and circumstances are exclusively within their knowledge—a theory to which I do not subscribe—but because it was an event which should not have happened and which prima facie indicates negligence on the part of those in charge of the child just as much as the presence of a motor-car on the foot pavement prima facie points to negligence on the part of the driver.

How, then, did the appellants seek to explain or justify this child's presence in the road?

Their case was that the mistress in charge, Miss Morgan, had left this child and one other unattended by any adult for a few minutes while she went to the toilet before taking them out for a walk in the town and that she had been unexpectedly detained for a few minutes longer attending to another child who had received an injury, and during her absence the two children had got out of the school premises onto the road. The evidence with regard to times and distances showed that the children must have run out almost immediately after Miss Morgan left the room.

At the trial the only question debated, apart from that of the duty owed to the deceased man, seems to have been whether or not Miss Morgan had been guilty of negligence. On this issue Devlin J., although considering the case a borderline one, decided in favour of the respondent. This view was upheld in the Court of Appeal, although Romer L.J. clearly indicated that but for the fact that he did not feel justified in interfering with the trial judge's finding he would have held otherwise. If the speeches in this House in the recent case of *Benmax* v. *Austin Motor Co. Ld.*[15] had been available to the Lord Justice he would, I think, undoubtedly have dissented.

My Lords, on this issue I agree with my noble and learned friends, Lords Oaksey and Goddard, that the evidence disclosed no negligence on the part of Miss Morgan. It is easy after the event to think of several things she might have done which would have avoided the accident which resulted from her absence, but the question is whether her failure to take such action in the circumstances which existed amounted to negligence. For myself, I have no hesitation in holding that Miss Morgan was not shown to have been guilty of any negligence and that no responsibility for the death of the deceased man attaches to her.

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[15] [1955] 2 W.L.R. 418; [1955] 1 All E.R. 326.

This does not, however, dispose of the case. The explanation put forward by the appellants entirely fails to explain how or why it was possible for this tiny child to escape from the school premises onto the street. The trial judge drew the inference that the child got out through the unlocked side gate opening onto a lane leading into the street. This was the way the child was brought to and taken from school, and I think the judge's inference was the most probable one. No explanation was given as to why the gate was kept unlocked or in such a condition that it was possible for a child of four to push it open or unlatch it. Nor was any other means of exit suggested as likely, except by going through other portions of the school premises not forming part of the nursery school and out of a gate leading directly onto the street.

My Lords, I think the appellants failed altogether to show that the child's presence in the street was not due to any negligence on their part or on that of those for whom they are responsible. It is true that no questions were directed to the appellants' witnesses on this matter, but the respondent should not suffer for the appellants' failure in this respect. If, as is no doubt the fact, it is not possible for every child in the nursery school at every moment of time to be within sight of a mistress in view of the contingencies which must arise from time to time—such as those which occurred in this case—then reasonable precautions must be taken which will be effective to prevent children of this tender age running out onto a busy street. No such precautions were shown to have been taken in this case and on the evidence as it stood at the conclusion of the trial the appellants had, I think, failed to rebut the presumption of negligence arising from the facts disclosed.

While entirely absolving Miss Morgan from the finding of negligence against her, I am none the less of opinion that the appellants do not thereby escape responsibility, and for these reasons I would dismiss the appeal.

LORD KEITH OF AVONHOLM. My Lords, if I find two toddlers, not quite four years of age, unaccompanied in a busy street, exposed to all the perils of a traffic accident, my natural reaction is to think that someone has been thoughtless, or careless, or negligent of their safety. This is not necessarily so, for, with that unpredictability which is characteristic of the very young, they may have eluded all reasonable vigilance of their guardians. If, however, the carefulness, or carelessness, of the person responsible for their safety becomes a material issue, it is, in my opinion, for the person in charge of them to negative carelessness, or to show reasonable care. In this matter I agree with Devlin J. and Denning L.J.

In what I have said and in what I am about to say I wish to make it clear that I am dealing with the case of a child so young that it cannot safely be allowed on a busy street by itself. With a child of an age to be allowed to find its own way to school, or to traverse the streets alone, different considerations arise. There can normally be no duty to prevent such a child from getting onto a street, and in the case of a traffic accident in which it is involved the question of responsibility for the accident will be considered in general with reference to the conduct of the child itself and of the other person involved in the accident. There may also be special cases of country children from wayside cottages using a road in full sight of approaching traffic or tiny tots on some side street obviously used as a children's playground. Such cases will have to be considered on their special circumstances.

Turning now to the facts of this particular case, I cannot avoid the conclusion that someone was to blame for the small boy, not yet four years of age, getting onto College Street. The child and another child of the same age, all dressed to go for a walk in the town with their teacher, were left in the class-room of a nursery school. The teacher had occasion to leave the room. The other small children were playing outside in a playpen under the supervision of an assistant teacher. The two children were left temporarily without any supervision. Two little girls, nine years of age, from the junior school, may have been for some time in the room preparing beds for the toddlers' afternoon nap. But there is no evidence from these girls and no evidence of what the children were doing while the girls were there.

The room gave on to a vestibule which led directly into a playground and from the playground access could be had by a gate to a lane leading to College Street, some 50 yards away. Another access to College Street could be had down the side of the junior school and through the junior school playground, but it seems unlikely that the children took that route on to the street. It is obvious that the children got through an open door and gate, or through a door and gate that was easily openable by children of four years of age. Miss Morgan says that the latch on the classroom door was so low that it could be opened by the nursery children. She also says that she relied on the two nine-year-old girls—presumably to keep an eye on the children while she was out of the room. But, as I have said, the two girls gave no evidence and there is no evidence at all as to how these little children got out of the school and onto the road, or as to how long they remained in the room after Miss Morgan left them. She was apparently kept out of the room longer than she expected, through an accident to another child, and during that time no steps were taken to see what the children were doing.

In that situation the appellants, in my opinion, have failed to give any explanation that would excuse them from the prima facie inference of carelessness that arises from the children having escaped onto the road. Whether the inference is one of lack of proper supervision, or lack of safeguards against very small children escaping through doors and gateways onto the street does not, in my opinion, matter. I would say that there was a presumption of negligence here that the appellants have failed to discharge.

Does there, then, arise any question of a duty owing, in respect of the child's escape, to the respondent's husband? I think there does. The duty owed to the child is to see that it does not become involved in a traffic accident by which it is injured. In my opinion it should be in the contemplation of any reasonable person that just such an accident may well arise in the case of a very small child that is allowed to escape onto a busy thoroughfare in a town. If such a traffic accident is not too remote to be foreseen, it is not, in my opinion, too remote to foresee injury to the person, other than the child, involved in the accident. It is not necessary that the precise result should be foreseen. The case is clearly distinguishable from *Bourhill* v. *Young*,[16] where the circumstances were such as to put the pursuer outside the field of persons to whom the motor-cyclist in that case owed a duty.

Reference was made to a number of cases related to collisions with animals straying onto the highway. I agree that these cases

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[16] [1943] A.C. 92.

H. L. (E.)
1955

CARMARTHENSHIRE COUNTY COUNCIL *v.* LEWIS.

Lord Keith of Avonholm.

cannot be equated to a case of small children allowed to stray onto a busy street in a town. The law with regard to straying animals is based on historical reasons which have no application to children of tender years unable to look after themselves. The law with regard to animals on the highway in relation to other users of the highway is not affected by the age or highway experience of the animal in question, and the law with regard to straying children cannot be elucidated by reference to principles derived from a right to depasture cattle in open fields. No assistance in this case can, in my opinion, be obtained from examining cases of straying animals or considering the circumstances in which their owners may or may not be liable for a traffic accident.

I would dismiss the appeal.

Appeal dismissed.

Solicitors: *A. D. Vandamm & Co. for Le Brasseur, Davis & Son, Newport, Mon.; Davies, Arnold & Cooper for T. Llewellyn Jones, Neath.*

E3. wales fund.

[HOUSE OF LORDS.]

H. L. (E.)*
1954
Dec. 13, 14, 15, 16.
1955
Feb. 17.

INLAND REVENUE COMMISSIONERS . APPELLANTS;

AND

BADDELEY AND OTHERS . . . . . RESPONDENTS.

[TWO APPEALS.]

Charity—Public—Section of community—Trusts for "the promotion "of the religious social and physical well-being of persons resident "in" named localities who "are members or likely to become "members of the Methodist Church"—No valid charitable trust —Assessment of conveyances to stamp duty—Statute of Charities, 1601 (43 *Eliz.* 1, *c.* 4)—*Finance Act,* 1947 (10 & 11 *Geo.* 6, *c.* 35), *ss.* 52 (1) (2), 54 (1).

Charity—Recreation.

By the first of two conveyances of the same date land, on which were a mission church, lecture room and store, was transferred to trustees, and by the second four other pieces of land laid out as playing fields were transferred to them, and it was directed that a specified sum be held as though it were capital money arising from the sale of those pieces of land. The first conveyance provided: "The trustees shall permit the said property to be "appropriated and used by the leaders for the time being of the "Stratford Newtown Methodist Mission for the promotion of the "religious social and physical well-being of persons resident in "the County Boroughs of West Ham and Leyton . . . by the "provision of facilities for religious services and instruction and "for the social and physical training and recreation of such "aforementioned persons who for the time being are in the opinion "of such leaders members or likely to become members of the "Methodist Church and of insufficient means otherwise to enjoy "the advantages provided by these presents and by the provision of "facilities for religious social and physical training and recreation "and by promoting and encouraging all forms of such activities as "are calculated to contribute to the health and well-being of such "persons . . ." The second conveyance directed the trustees to permit the property thereby conveyed to be appropriated and used ". . . for the promotion of the moral social and physical well-"being of persons resident in the County Boroughs of West Ham "and Leyton . . . who for the time being are in the opinion of "such leaders members or likely to become members of the Methodist "Church and of insufficient means otherwise to enjoy the advan-"tages provided by these presents by the provision of facilities for "moral social and physical training and recreation and by pro-"moting and encouraging all forms of such activities as are calcu-"lated to contribute to the health and well-being of such persons ". . ." In relation to the amount of stamp duty payable, the question arose whether the conveyances were made to "a body of "persons established for charitable purposes only or to the trustees "of a trust so established" within section 54 (1) of the Finance Act, 1947:—

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* *Present*: VISCOUNT SIMONDS, LORD PORTER, LORD REID, LORD TUCKER and LORD SOMERVELL OF HARROW.

Held (*per* Viscount Simonds, Lord Porter, Lord Tucker and Lord Somervell of Harrow, Lord Reid dissenting), that the trusts were not charitable. They did not fall within the first three heads of charities set out in *Income Tax Special Purposes Commissioners* v. *Pemsel* [1891] A.C. 531, 583; 7 T.L.R. 657, nor did they fall within the fourth head (viz., "other purposes beneficial to the com-"munity"), since they were expressed in language so vague as to permit the property to be used for purposes which the law did not regard as charitable and which did not satisfy the necessary element of public benefit.

Per Viscount Simonds. Further, the trusts were also excluded from the fourth head because the beneficiaries, being confined to members and potential members of the Methodist Church, did not constitute a sufficient class to satisfy the necessity of a benefit to the public.

Per Lord Reid. The words of the trust were not too vague and the class to be benefited was not too narrow. The members of a particular Church constitute a section of the community for the purposes of the fourth head just as much as for those of the third (viz., the advancement of religion).

Per Viscount Simonds and Lord Reid. A trust for the provision of a recreation ground for the community may be supported as charitable unless the class of beneficiaries is too narrow.

Williams' Trustees v. *Inland Revenue Commissioners* [1947] A.C. 447; 63 T.L.R. 352; [1947] 1 All E.R. 513 applied.

Dunne v. *Byrne* [1912] A.C. 407; 28 T.L.R. 257; *Farley* v. *Westminster Bank Ld.* [1939] A.C. 430; 55 T.L.R. 943; [1939] 3 All E.R. 491; *Oppenheim* v. *Tobacco Securities Trust Co. Ld.* [1951] A.C. 297; [1951] 1 T.L.R. 118; [1951] 1 All E.R. 31; *Inland Revenue Commissioners* v. *City of Glasgow Police Athletic Association* [1953] A.C. 380; [1953] 1 All E.R. 747 and *Londonderry Presbyterian Church House Trustees* v. *Inland Revenue Commissioners* [1946] N.I. 178; 27 T.C. 431 considered.

Decision of the Court of Appeal (sub nom. *Baddeley and Others* (*Trustees of the Newtown Trust*) v. *Inland Revenue Commissioners*) [1953] Ch. 504; [1953] 2 All E.R. 233 reversed.

APPEALS from the Court of Appeal (Evershed M.R., Jenkins and Hodson L.JJ.).

These were appeals from orders dated May 18, 1953, of the Court of Appeal, allowing appeals by the respondents, the trustees of the Newtown Trust, Bernard Baddeley, Bertie Augustus Campbell, Margaret Irene Miles, Mary Betty Collingridge, James Ball, Frederick Alfred John Pace and Francis Gordon Feather, from orders dated December 18, 1952, of the Chancery Division (Harman J.) in favour of the appellants, the Commissioners of Inland Revenue, on cases stated under section 13 of the Stamp Act, 1891, for the opinion of the court as to the stamp duty chargeable on two conveyances to the respondents, presented by them for adjudication under that section. In each case the substantial issue was whether the trusts declared by the conveyances were wholly charitable. The trusts in the two cases were similar but not identical.

The deed of conveyance in question in the first appeal was dated August 21, 1951, and related to land at Stratford in the County of Essex which was conveyed to the respondent trustees on trusts thereby declared. The property comprised therein consisted of an area of about 680 square yards of land with a mission church, lecture room and store erected thereon or on some part thereof. By clause 2 (*a*) the following trusts were declared: "The "trustees shall permit the said property to be appropriated and "used by the leaders for the time being of the Stratford Newtown "Methodist Mission under the name of 'The Newtown Trust' "(hereinafter called 'the Foundation') for the promotion of the "religious social and physical well-being of persons resident in the

"County Boroughs of West Ham and Leyton in the County of "Essex by the provision of facilities for religious services and "instruction and for the social and physical training and recreation of such aforementioned persons who for the time being are "in the opinion of such leaders members or likely to become "members of the Methodist Church and of insufficient means "otherwise to enjoy the advantages provided by these presents "and by promoting and encouraging all forms of such activities as "are calculated to contribute to the health and well-being of such "persons. Provided always that the trustees shall not at any "time hereafter and so long as the trusts hereby declared shall "not have totally failed use or permit the said property to be "used either for physical training or physical recreation or any "kind of game on Sundays Christmas Days or Good Fridays or "for the sale or consumption of intoxicating drink." There followed certain ancillary provisions.

The deed of conveyance in question in the second appeal was also dated August 21, 1951, and related to land at Ilford in the County of Essex which was conveyed to the respondent trustees on trusts thereby declared. The property comprised therein consisted of an area of land laid out as a playing field. By clause 2 (*a*) the following trusts were declared: "The trustees "shall permit the said property to be appropriated and used by "the leaders for the time being of the Stratford Newtown "Methodist Mission under the name of 'The Newtown Trust' "(hereinafter called 'the Foundation') for the promotion of the "moral social and physical well-being of persons resident in the "County Boroughs of West Ham and Leyton in the County of "Essex who for the time being are in the opinion of such leaders "members or likely to become members of the Methodist Church "and of insufficient means otherwise to enjoy the advantages "provided by these presents by the provision of facilities for "moral social and physical training and recreation and by "promoting and encouraging all forms of such activities as are "calculated to contribute to the health and well-being of such "persons Provided always that the trustees shall not at any "time hereafter and so long as the trusts hereby declared shall "not have totally failed use or permit the said property to be "used either for physical training or physical recreation or any "kind of game on Sundays Christmas Days or Good Fridays or "for the sale or consumption of intoxicating drink."

In relation to the amount of stamp duty payable, the question arose whether the conveyances were made to "a body of persons "established for charitable purposes only or to the trustees of a "trust so established" within section 54 (1) of the Finance Act, 1947. The Court of Appeal, reversing the decision of Harman J., held that they were so made. The Commissioners of Inland Revenue appealed to the House of Lords.

Geoffrey Cross Q.C., *J. H. Stamp* and *E. Blanshard Stamp* for the appellants. The only reference to religion in the Statute of Charities (43 Eliz. 1, c. 4) is the reference to churches. This may have been because pious uses were so well known that it was not thought necessary to enumerate them. Education was plainly referred to. Then there is the relief of some form of disability or distress. Apart from these objects there is the element of public works, such as the repair of seabanks and highways. If one cannot bring a trust within the category of religion, education or the relief of distress but relies on the public works element, the section of the public to be benefited must be a geographical section, e.g., "my country England" or "the parish of Shipley" or "the county of Westmorland." To provide a bridge for Methodists would not be a good charitable trust. Such a class might be sufficient to support an educational or religious trust or one for the relief of poverty, but it would not support a trust depending on public utility, and the consideration of matters under this last head should not be affected by an aroma of religion. The members of the Court of Appeal allowed their minds to be coloured by the fact that the beneficiaries are members of a sect. There is a radical distinction between a trust for the purposes of the first three heads and one for the purposes of the last head. Thus a trust is not charitable if confined to members of a particular Church within a limited geographical area, and the charitable character of this trust is vitiated by the limitation to Methodists, although the class would be sufficient in the case of a trust for education, religion or the relief of distress. What is proposed here is different from an educational institution, for a religious meeting would not be directly promoting the intellectual and social well-being of the beneficiaries, and the same people would not necessarily take part in all the functions, whereas while in an educational institution there might be provision for recreation, the same body of persons would be attending both the educational and the recreative functions. It is one thing to say that one cannot entirely neglect any one aspect of a charitable trust and another thing to say that every moment of the user must subserve all the charitable ends defined; the latter would make the trust unworkable. But this trust is not religious any more than it is for the relief of distress. The words used are too wide and too vague. Further, the encouragement of sport is not a charitable object. Thus if it is charitable at all this case must fall within the fourth class of charities defined by Lord Macnaghten in *Income Tax Special Purposes Commissioners* v. *Pemsel.*[1] But it does not, because his words "beneficial to the "community" mean beneficial to the whole community, not to Methodists only. A trust for the relief of sick or disabled Methodists would be good as a trust for the relief of disability or distress, although it would be available to rich Methodists as well as poor, for such relief is covered by the words "relief "of poverty." This is reinforced by the words of Sir Samuel Romilly (then Mr. Romilly) in *Morice* v. *Bishop of Durham,*[2] from whom Lord Macnaghten took his classification, where the words used are "relief of the indigent."

The objects in these trusts are not exclusively charitable. Not every philanthropic object is charitable: *In re Macduff.*[3] *Dunne* v. *Byrne*[4] is also relied on as drawing a distinction between a religious trust and a purpose conducive to the good of religion. The Court of Appeal in the present case did not face the implications of *Farley* v. *Westminster Bank Ld.,*[5] where the House of Lords held that a trust for parish work for the moral and spiritual good of the congregation was not charitable: see also that decision in the Court of Appeal, *In re Ashton, Westminster Bank* v. *Farley.*[6] The present case is governed by *Williams' Trustees* v. *Inland Revenue Commissioners.*[7] The difficulty of reconciling that case with *Goodman* v. *Mayor of Saltash*[8] is resolved by *In re Strakosch.*[9] The appellants' argument accords with *Londonderry Presbyterian Church House Trustees* v. *Inland Revenue Commissioners.*[10] It is indistinguishable from the present case. It shows that the trust purposes in this case are not charitable and also that a particular sect is not a section of the public: see *per*

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[1] [1891] A.C. 531, 583; 7 T.L.R. 657.

[2] (1805) 10 Ves. 522, 532.

[3] [1896] 2 Ch. 451, 466, 468–9, 470–1; 12 T.L.R. 452.

[4] [1912] A.C. 407; 28 T.L.R. 257.

[5] [1939] A.C. 430, 435; 55 T.L.R. 943; [1939] 3 All E.R. 491.

[6] [1938] Ch. 482, 495, 498; 54 T.L.R. 491; [1938] 1 All E.R. 707.

[7] [1947] A.C. 447; 63 T.L.R. 352; [1947] 1 All E.R. 513.

[8] (1882) 7 App.Cas. 633.

[9] [1949] Ch. 529; 65 T.L.R. 383; [1949] 2 All E.R. 6.

[10] [1946] N.I. 178; 27 T.C. 431.

Babington L.J.[11] That case is in line with *Williams' Trustees* v. *Inland Revenue Commissioners.*[12]

While the Methodist Church would constitute an adequate class of beneficiaries in the case of a trust for religion or education or the relief of distress, it will not support a charitable trust for public purposes. That fourth head requires the whole community or all the inhabitants of a certain locality. The accident that this trust is concerned with a sect should not cause one to import into the case the considerations applicable to a religious trust. A trust for the promotion of agriculture might be justified as charitable on the ground that it benefited the whole community, but a trust to promote agriculture among Methodists would not be charitable. A trust to promote agriculture among distressed Methodists might be held charitable if it was really for the relief of poverty. The distinctions based on considerations of whether or not a body is "fluctuating" are not helpful because in a sense every body is fluctuating.

Verge v. *Somerville*[13] might be used against the appellants, but though the beneficiaries might not be strictly poor persons they were in need. This case was similar to air raid or flood distress funds.

J. H. Stamp following. It is useful to refer to the Statute of Elizabeth I. Lord Macnaghten's classification in *Pemsel's* case[14] can only be understood if one analyses the items which he sought to epitomize by reference to the original classification by Sir Samuel Romilly in *Morice* v. *Bishop of Durham*,[15] which is more useful and more accurate than Lord Macnaghten's. The two classifications refer respectively to the fourth class as "other "purposes beneficial to the community" and "objects of general "public utility." These include only public activities such as building roads or bridges and cannot cover trusts for beneficiaries who are only a class of the community. They are fundamentally distinguished from all the other cases in the preamble to the Statute of Elizabeth I in that they indicate what class is to be benefited, viz., the whole community. The operations within the fourth class inevitably enure for the benefit of the community living near enough to take advantage of them, and thus they automatically indicate the measure of the scope of the beneficiaries. In the case of the other three classes there is nothing to indicate what that scope is save reference to the needs of the beneficiaries. Where in the Statute of Elizabeth I does one find anything to prevent a charitable trust being established for six persons known to the settlor? Only by the inference that such a trust is not motivated by a charitable intention. Thus self interest and private interest must be excluded. It is necessary for a charitable trust such as this to operate over a public area. The court must find the necessary degree of public character. Items in the preamble to the statute, such as repair of bridges, can only be regarded as examples. The fourth class indicates such trusts as improve the safety or amenity of the general setting of the community, which operate for the benefit of the whole population within their reach.

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[11] [1946] N.I. 178, 191; 27 T.C. 431, 448.

[12] [1947] A.C. 447.

[13] [1924] A.C. 496; 40 T.L.R. 279.

[14] [1891] A.C. 531, 583.

[15] 10 Ves. 522, 532.

S. Pascoe Hayward Q.C. and *W. F. Waite* for the respondents. Three questions arise: (1) What are the trusts intended to affect this property and what is the right construction of the two conveyances? (2) Is the trust in each case for the benefit of the public or a section of the public? (3) If so, is it beneficial in a way which the law regards as charitable, as being within the spirit and intendment of the Statute of Elizabeth I?

As to (1), each conveyance defines an object to be achieved, viz., the promotion of religious, moral, social and physical well-being in the class defined; the rest of the provisions describe the means by which this object is to be achieved. The case stands or falls according as this object is or is not held to be a good charitable object. The promotion of well-being imports the idea of improvement. One sort of well-being cannot be pursued to the neglect of the others. Mere social intercourse is not intended; there must also be the inculcation of acceptable standards of social behaviour. The provision of facilities for training and recreation goes hand in hand with the rest and is very significant as showing that on the fair construction of the deeds it was never intended to provide mere apparatus for enjoyment in a social club and sports ground. In each case the property is to be appropriated and used by the leaders of the mission. The activities were directed to making people good Methodists. Viewing the matter over a period of time, the people who attended must have their moral, social and physical well-being promoted. Someone who came in drunk or abusive would be excluded, as would persons whose presence was not thought to subserve the objects of the trust.

As to (2) and (3), even if these trusts are not otherwise charitable, they are for the relief of poverty and therefore charitable on that ground. The playing fields are for persons who could not otherwise afford to pay for facilities. The social training likewise is only for persons of insufficient means; there is a means test. The dominant purpose was to confer benefits on people who could not afford them. Further, these were trusts for the advancement of education. In any event these are good charitable trusts within the fourth class defined in *Pemsel's* case,[16] and they are none the less so because they are confined to a particular sect.

Trusts to promote public morality, including trusts to promote kindness to animals, are good charitable trusts: *In re Wedgwood*[17]; *National Anti-Vivisection Society* v. *Inland Revenue Commissioners*[18]; *In re Douglas*[19]; *In re Moss.*[20] How wide is the fourth class as covering the advancement of various doctrines appears from *In re Scowcroft*[21] and *In re Hood.*[22] The matter was properly summed up by Jenkins L.J. in the Court of Appeal in the present case[23] when he said that, given the requisite element of public benefit, the question was whether the trust was charitable within the spirit and intendment of the Statute of Elizabeth I. The present trusts are within the spirit and intendment of that Act. Trusts for moral and religious improvement are charitable, and it would be absurd to hold that the trusts in this case for moral improvement are not charitable.

As to educational trusts, see *In re Shaw's Will Trusts.*[24] As to trusts for recreation, see *In re Hadden*[25] and *Shillington* v. *Portadown Urban District Council.*[26]

Farley v. *Westminster Bank Ld.*[27] is distinguishable, because "parish work" is vastly wider than the objects here in question. *Dunne* v. *Byrne*[28] is also distinguishable, since the trust there could only be justified, if at all, as a religious trust, and it failed as such. *Williams' Trustees* v. *Inland Revenue Commissioners*[29] was wholly different from the present case as the trusts were far wider. As to *Londonderry Presbyterian Church House Trustees*

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[16] [1891] A.C. 531, 583.

[17] [1915] 1 Ch. 113, 117–8; 31 T.L.R. 43.

[18] [1948] A.C. 31, 45, 67; 63 T.L.R. 424; [1947] 2 All E.R. 217.

[19] (1886) 35 Ch.D. 472, 478, 487; 3 T.L.R. 589.

[20] (1949) 65 T.L.R. 299, 299–300; [1949] 1 All E.R. 495.

[21] [1898] 2 Ch. 638, 641–2; 15 T.L.R. 4.

[22] [1931] 1 Ch. 240, 251–2; 46 T.L.R. 571.

[23] [1953] Ch. 504, 532–3; [1953] 2 All E.R. 233.

[24] [1952] Ch. 163, 165, 171–2; [1951] 2 T.L.R. 1249; [1952] 1 All E.R. 49.

[25] [1932] 1 Ch. 133; 48 T.L.R. 9.

[26] [1911] 1 I.R. 247.

[27] [1939] A.C. 430.

[28] [1912] A.C. 407.

[29] [1947] A.C. 447.

v. *Inland Revenue Commissioners*[30] the decision at first instance should be approved and that of the Court of Appeal rejected. MacDermott J. put the case for the respondents as well as it can be put. There are no authorities binding the House to hold that the trusts in the present case are non-charitable.

This trust is for the benefit of the public and falls within the fourth class referred to in *Pemsel's* case.[31] It comes within Lord Wrenbury's words in *Verge* v. *Somerville*.[32] A section of the public sufficient to support a valid charitable trust in the first three classes is sufficient also in the case of the fourth. To distinguish the fourth class from the others would be to introduce an unnecessary complication into the law.

[*Ellis* v. *Inland Revenue Commissioners*[33]; *Mitford* v. *Reynolds*[34] and *In re Norwich Town Close Estate Charity*[35] were also referred to.]

Sir Reginald Manningham-Buller A.-G., Q.C. and *Denys Buckley* as amici curiae. The provision of facilities for recreation, outdoor or indoor, for adults is a charitable purpose, as is also the provision of village halls.

A long series of Acts of Parliament have treated the dedication of land to the public for recreational facilities as a charitable purpose. By the Education Act, 1921, s. 86, physical training comes within the purview of education. The Ministry of Education memorandum as to trust deeds of premises to be acquired by a voluntary organization with the aid of a grant by the Minister under section 3 of the Physical Training and Recreation Act, 1937 (Memo. A.W.2), treats the purposes in question as charitable. The Recreation Grounds Act, 1859, indicates that the provision of playgrounds was then regarded as falling within trusts for charitable purposes, since by section 5 the Charity Commissioners had power to settle a scheme. The Mortmain and Charitable Uses Act, 1888, s. 6, treated land dedicated as a public park as dedicated to a charitable purpose: see the repetition of the Statute, 43 Eliz. 1, c. 4, in section 13 (2). The Act indicates that the fourth class of charities in *Pemsel's* case[36] cannot be confined to public works like highways and can include parks. See also Local Government Act, 1894, s. 14 (1); Open Spaces Act, 1906, s. 3; Education Act, 1944, ss. 41 and 53. In the case of land dedicated to the public for recreational use there can be no valid distinction between land without buildings on it and land with buildings on it (e.g., a village hall): see *In re Hadden* [37]; *In re Foakes* [38] and *In re Chesters*.[39] Harman J. at first instance in the present case was wrong when he said that recreation is not a charitable object.[40]

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[30] [1946] N.I. 178; 27 T.C. 431.

[31] [1891] A.C. 531, 583.

[32] [1924] A.C. 496, 499.

[33] (1949) 31 T.C. 178.

[34] (1841) 1 Ph. 185.

[35] (1888) 40 Ch.D. 298, 305, 306; 5 T.L.R. 197.

[36] [1891] A.C. 531, 583.

The purposes defined by the deeds in the present case fall within the second head set out in *Pemsel's* case,[41] viz., the advancement of education, in so far as they do not relate to religious purposes. They are not really for the relief of poverty but to promote religious, social and physical well-being, and in that sense they are educational: *per* Evershed M.R. in the Court of Appeal in the present case.[42] See also *In re Shaw*.[43]

These trusts are charitable: see *Pemsel's* case [44] and *In re Simson*.[45] The purposes defined are not nearly so indefinite as in *Farley* v. *Westminster Bank Ld.*[46] and, if these trusts are held to be educational, one is not troubled by that case. The promotion of well-being constitutes a form of education.

[Reference was also made to *Londonderry Presbyterian Church House Trustees* v. *Inland Revenue Commissioners* [47] and *Ellis* v. *Inland Revenue Commissioners*.[48]]

Geoffrey Cross Q.C. in reply. In these documents "social" should be read in its ordinary sense and that is not charitable. This cannot be an educational trust because it might cover the maintenance of a bowls ground for elderly Methodists. It is not a religious trust or a poverty trust either, although the first class defined in *Pemsel's* case [49] is not confined to poverty in the strict sense; all forms of distress and inability come within it, e.g., the blind, or air raid victims. "Indigent" indicates people who lack something at the moment.

If this trust were charitable at all it would come within the fourth class. It is a fallacy to regard this as a residuary class to catch trusts of an obviously useful sort which cannot be brought within the other three classes; that would lead to uncertainty and decisions would vary with the length of the judge's foot. In the case of a trust under the fourth head a religious qualification is ridiculous. Once one cuts down the trust to benefit less than the

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[37] [1932] 1 Ch. 133, 141–2.

[38] (1933) Feb. 21, unrep.

[39] (1934) July 25, unrep.

[40] [1953] 1 W.L.R. 84, 90; [1953] 1 All E.R. 63.

[41] [1891] A.C. 531, 583.

[42] [1953] Ch. 504, 518.

[43] [1952] Ch. 163, 167–8.

[44] [1891] A.C. 531, 581, 583.

[45] [1946] Ch. 299; 62 T.L.R. 498; [1946] 2 All E.R. 220.

[46] [1939] A.C. 430.

[47] [1946] N.I. 178; 27 T.C. 431.

[48] 31 T.C. 178, 192.

[49] [1891] A.C. 531, 583.

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public generally the limitation need not be to a sect; it might be to bakers. Sir Samuel Romilly in *Morice* v. *Bishop of Durham* [50] was right in defining the fourth class as objects of "general "public utility."

The "animal" trusts are anomalous but could be justified on educational grounds. It does not follow from them that trusts for moral improvement are ipso facto charitable.

Trusts for village halls may generally be good charitable trusts, although qualifications might make them bad.

Shillington v. *Portadown Urban District Council* [51] may be a right decision although the reasoning is open to criticism. As regards *In re Hadden*,[52] one should note particularly clause 13 of the will in that case. *In re Nottage* [53] shows that a gift for the encouragement of mere sport cannot be charitable

S. Pascoe Hayward Q.C. *In re Nottage* [53] is to be distinguished on the grounds stated by Jenkins L.J. in the Court of Appeal,[54] viz., that the present trust is not for the encouragement of mere sport.

Their Lordships took time for consideration.

1955. Feb. 17. VISCOUNT SIMONDS. My Lords, these consolidated appeals raise once more a question, which has so often caused doubt and difficulty in the courts of this country, whether certain trusts are charitable in the sense which the law accords to that word. It need cause no surprise, though it may cause regret, that this should be so. For while no comprehensive definition of legal charity has been given either by the legislature or in judicial utterance, “there is no limit to the number and diversity of the ways in which man will seek to benefit his fellowmen.” To determine, whether the privileges, now considerable, which are accorded to charity in its legal sense, are to be granted or refused in a particular case, is often a matter of great nicety, and I think that this House can perform no more useful function in this branch of the law than to discourage a further excess of refinement where already so many fine distinctions have been made.

In the present appeals the controversy is about the amount of stamp duty payable in respect of two deeds of conveyance, by which trusts were declared of certain property thereby respectively conveyed. If the trusts so declared were charitable the duty is smaller than if they were not charitable. The sums actually at stake are trifling but the issue is an important one. It was decided in favour of the appellants, the Inland Revenue Commissioners, by Harman J., but against them by the Court of Appeal. Hence the present appeal.

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[50] 10 Ves. 522, 532.

[51] [1911] 1 I.R. 247.

[52] [1932] 1 Ch. 133.

[53] [1895] 2 Ch. 649; 11 T.L.R. 519.

[54] [1953] Ch. 504, 535.

I find it convenient, my Lords, to examine the two deeds separately, and take first a deed of conveyance to the respondents as trustees of certain land at Stratford, in the county of Essex, of an area of about 680 square yards with a mission church, lecture room and store erected on some part thereof. So far as relevant (omitting certain words which admittedly were inserted in error) the trusts of this property were as follows: [His Lordship read clause 2 (*a*) and continued:] This main trust is followed by certain ancillary provisions which cannot, I think, affect the question whether it is a charitable trust. It is at once apparent that the document is not skilfully drawn. It is presumably *all* the persons resident in the specified boroughs whose religious, social and physical well-being is to be promoted, but this is to be achieved by providing certain facilities for religious services and instruction and for the social and physical training and recreation of " such aforementioned persons," i.e., such residents, as are for the time being " in the opinion of such " leaders members or likely to become members of the Methodist " Church and of insufficient means . . . to enjoy the advantages " provided by these presents." This awkward phraseology leaves me in doubt whether the beneficiaries under this trust are to be all the residents in a certain area or only such of the residents as satisfy two conditions, first that they are Methodists or in the opinion of the leaders potential Methodists, and secondly, that they are of limited means. It might even be that upon a true interpretation of the deed some benefits are open to all the residents, others to a more limited class. Fortunately I do not find it necessary to determine this question, for I think that, whatever view may be taken of it, this case is governed by the recent decision of this House in *Williams' Trustees* v. *Inland Revenue Commissioners.*[1]

Before, however, I examine that case and certain other cases which must, I think, guide your Lordships' decision, I must first dispose of two contentions which were urged, the one by the respondents and the other by the Attorney-General, against the appeals.

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[1] [1947] A.C. 447; 63 T.L.R. 352; [1947] 1 All E.R. 513.

By the respondents it was contended that the trusts of the deed could be supported as valid charitable trusts on the ground that they came within the first head of Lord Macnaghten's classification in *Income Tax Special Purposes Commissioners* v. *Pemsel*,[2] viz., that they were for the relief of poverty. This contention was, in my opinion, rightly rejected both by Harman J. and the Court of Appeal. I do not question that there may be a good charity for the relief of persons who are not in grinding need or utter destitution: see *In re De Carteret*.[3] But I agree with Harman J. and am content to adopt his words that relief connotes need of some sort, either need for a home or for the means to provide for some necessity or quasi-necessity, and not merely an amusement, however healthy.

The Attorney-General, appearing as amicus curiae, urged that the validity of the trust could be sustained on the ground that, regarded as a whole, it was an educational charity. This contention had not previously been put forward and your Lordships have not the advantage of knowing the views upon it of the learned judge and the Court of Appeal. The short answer appears to me to be that, regarded as a whole, the sum of the activities permissible under the deed can only be regarded as educational in the sort of loose sense in which all experience may be said to be educative, and that, if such activities are examined one by one, it would be impossible to regard many of them as in even the loosest sense educational.

If, then, this trust is charitable, it can only be because it falls within the fourth class in Lord Macnaghten's classification; that is, it must be a trust of general public utility and must be within the spirit and intendment of the preamble to the statute 43 Eliz. 1, c. 4. And this is what the Court of Appeal has held it to be.

My Lords, with great respect to the singularly acute and refined argument of Jenkins L.J., who delivered the leading judgment in the Court of Appeal, I must doubt whether anything is gained by discussing whether the trust should be regarded as prescribing three separate and distinct objects, namely, (*a*) the promotion of religious well-being, (*b*) the promotion of social well-being, and (*c*) the promotion of physical well-being, or as having as its goal a state of complete well-being with three several aspects, religious, social and physical. Let it be assumed that, in the words of the learned Lord Justice, the object of the trust is the religious, social and physical improvement of the persons resident in the two boroughs: and let it be further assumed that this is the end desired for each of such persons, making such reservation as may be necessary for the fact that facilities for social and physical training are to be reserved for a limited class of those persons. Yet in the end the question is for what purposes may the trust property be used without trespassing beyond the language of the deed. I find that it may be used for promoting and encouraging all forms of such activities, i.e., the provision of facilities for (inter alia) social and physical training and recreation, "as are calculated to contribute to the health and well-being of "such persons." My Lords, I do not think it would be possible to use language more comprehensive and more vague. I must dissent from the suggestion that a narrow meaning must be ascribed to the word "social": on the contrary, I find in its use confirmation of the impression that the whole provision makes upon me, that its purpose is to establish what is well enough called a community centre in which social intercourse and discreet festivity may go hand in hand with religious observance and instruction. No one will gainsay that this is a worthy object of benevolence, but it is another question whether it is a legal charity, and it appears to me that authority which is binding on your Lordships puts it beyond doubt that it is not. Here we are not concerned to consider whether a particular use to which the trust property may be put is a charitable use: that is a question upon which different minds might well come to different conclusions. On the contrary, we must ask whether the whole range of prescribed facilities or activities (call them what you will) is such as to permit uses which are not charitable: if it is, it is not such a trust as the court can execute and it must fail.

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[2] [1891] A.C. 531, 583; 7 T.L.R. 657.

[3] [1933] 1 Ch. 103; 48 T.L.R. 555.

My Lords, I repeat that in this admittedly difficult branch of the law nothing is to be gained by adding refinement to refinement and I am satisfied that in the light of several decisions of this House, in which comparable general words have been held not to create a valid charitable trust, your Lordships would not be justified in taking a different view in the present case. From many cases I will take a few, selecting only those in which the generality of the words has been held to exclude an exclusively charitable connotation. In *Farley* v. *Westminster Bank Ld.*[4] the gift was to the respective vicars and churchwardens of two named churches "for parish work." Vague words indeed, but, if I had to write them out somewhat less vaguely, I could not easily find more appropriate words than those with which the trust of this deed begins and ends, adding perhaps something about the relief of the poor which at any rate would not detract from their charitable content. Yet this trust failed, because work (or activity) which conduces to the welfare of the parishioners (or which promotes their religious, social and physical well-being) is not confined to purposes legally charitable. So in an earlier case, *Dunne* v. *Byrne*,[5] a gift to the Roman Catholic Archbishop of Brisbane to be used in the manner "most "conducive to the good of religion in this diocese" as he might decide, was held to be invalid, because, though it had a prima facie religious content, yet the generality of the language admitted an application which the law would not consider charitable. The words of Lord Macnaghten, in delivering the judgment of the Board, may be recalled[6]: "The language of the bequest (to use "Lord Langdale's words) would be 'open to such latitude of "'construction as to raise no trust which a Court of Equity could "'carry into execution.'" These words are directly applicable to the present case, and, being applied, are fatal to the contention of the respondents. I do not refer to *Houston* v. *Burns*[7] or other cases in which the same principle has been applied, and come to the recent case of *Williams' Trustees* v. *Inland Revenue Commissioners*[8] which I have already mentioned. There the House had to consider a deed by which a trust was established for the benefit of Welsh people in London. Its object was declared to be to establish and maintain an institute and meeting place in London for the benefit of Welsh people resident in or near or visiting London with a view to creating a centre in London for promoting the moral, social, spiritual and educational welfare of Welsh people, and of fostering the study of the Welsh language and so on. The means by which this was to be achieved were, without prejudice to the generality of the object, set out with some particularity. The noble and learned Lords who heard the case (including my noble and learned friend Lord Porter) were unanimous in thinking that this was not a valid charitable trust. It is true that in the present case religious instruction is, but in

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[4] [1939] A.C. 430; 55 T.L.R. 943; [1939] 3 All E.R. 491.

[5] [1912] A.C. 407; 28 T.L.R. 257.

[6] [1912] A.C. 407, 411.

[7] [1918] A.C. 337; 34 T.L.R. 219.

[8] [1947] A.C. 447.

Williams' Trustees v. *Inland Revenue Commissioners* [8] was not, prescribed, but this distinction is irrelevant as it is conceded that the trust is not exclusively for religious purposes. But, apart from this distinction, what valid ground is there for distinguishing the two cases? I ignore at this stage any difference in the class of beneficiaries: that raises another and more difficult question. I look only at the nature of the benefits which are within the scope of the two trusts, having regard in each case to the language of the exordium, and in this aspect I am unable to find any material distinction. I hope that I do no injustice to the judgments of the Court of Appeal in the present case if I say that they appear to give a special meaning to the word "social" where it occurs in the present deed and, having done so, to give too much significance to that meaning. It is to be observed that "social" is a word that occurs in the *Williams' Trust* [8] deed also. It is probably true that, as Jenkins L.J. says, much turns on the construction of the several deeds, and it is perhaps because I have taken a different view of the meaning of a particular word that I have come to a different conclusion on the whole case. I am glad to think that in doing so I find myself in complete agreement with the Court of Appeal of Northern Ireland who, in *Londonderry Presbyterian Church House Trustees* v. *Inland Revenue Commissioners*,[9] had to construe a deed which is essentially comparable with that which your Lordships are considering and held that the trust thereby established was not a valid charitable trust.

Other aspects of the trust established by the first deed were discussed and it is right that I should make some observations upon them, but before doing so I will turn to the second deed, by which an area of land at Ilford in the county of Essex laid out as a playing field, upon parts of which a pavilion and groundsman's bungalow had been erected, was conveyed to trustees upon trusts which were substantially the same as those of the first deed except that (*a*) "moral" was substituted for "religious" in the opening words of the trust, (*b*) no reference was made to the provision of facilities for religious services and instruction, and (*c*) the benefits were unambiguously conferred exclusively upon residents who satisfied the conditions of membership or potential membership of the Methodist Church and insufficiency of means to which I have already referred. The second deed also contained certain ancillary provisions to which I need not refer and, further, a declaration of trust of the sum of £10,000 which had been paid to them and of any other money or property which might be paid or transferred to them which the trustees were directed to use or apply in such manner (I quote) "as the "trustees shall think most beneficial for promoting the objects "of the charity hereby constituted."

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[8] [1947] A.C. 447.

[9] [1946] N.I. 178; 27 T.C. 431.

Once more I submit to your Lordships that this trust must fail by reason of its vagueness and generality. The moral, social and physical well-being of the community or any part of it is a laudable object of benevolence and philanthropy, but its ambit is far too wide to include only purposes which the law regards as charitable. I need not repeat what I have said in regard to the promotion of religious, social and physical well-being, except to emphasize that to hold the one a valid and the other an invalid trust would be to introduce the sort of refinement which I deplore.

In regard to this second trust I will only add that it does not follow that, because a trust in the vague and general terms of the second deed cannot be supported, therefore a gift by devise or conveyance of land for a recreation ground must also fail. This was the particular concern of the Attorney-General, and I think it right to say that, in my opinion, a gift of land for use as a recreation ground by the community at large or by the inhabitants of a particular geographical area may well be supported as a valid charity. But I would reserve my opinion in a case in which the beneficiaries are a class determined, for instance, by adherence to a particular religion or by employment in a particular industry or by particular employers.

This brings me to another aspect of the case, which was argued at great length and to me at least presents the most difficult of the many difficult problems in this branch of the law. Suppose that, contrary to the view that I have expressed, the trust would be a valid charitable trust, if the beneficiaries were the community at large or a section of the community defined by some geographical limits, is it the less a valid trust if it is confined to members or potential members of a particular church within a limited geographical area?

The starting point of the argument must be, that this charity (if it be a charity) falls within the fourth class in Lord Macnaghten's classification. It must therefore be a trust which is, to use the words of Sir Samuel Romilly in *Morice* v. *Bishop of Durham*,[10] of "general public utility," and the question is what these words mean. It is, indeed, an essential feature of all "charity" in the legal sense that there must be in it some element of public benefit, whether the purpose is educational, religious or eleemosynary: see the recent case of *Oppenheim* v. *Tobacco Securities Trust Co. Ld.*,[11] and, as I have said elsewhere, it is possible, particularly in view of the so-called "poor "relations' cases," the scope of which may one day have to be considered, that a different degree of public benefit is requisite according to the class in which the charity is said to fall. But it is said that if a charity falls within the fourth class, it must be for the benefit of the whole community or at least of all the inhabitants of a sufficient area. And it has been urged with much force that, if, as Lord Greene said in *In re Strakosch*,[12] this fourth class is represented in the preamble to the Statute of Elizabeth by the repair of bridges, etc., and possibly by the maintenance of Houses of Correction, the class of beneficiaries or potential beneficiaries cannot be further narrowed down. Some confusion has arisen from the fact that a trust of general public utility, however general and however public, cannot be of equal utility to all and may be of immediate utility to few. A sea wall, the prototype of this class in the preamble, is of remote, if any, utility to those who live in the heart of the Midlands. But there is no doubt that a trust for the maintenance of sea walls generally or along a particular stretch of coast is a good charitable trust. Nor, as it appears to me, is the validity of a trust affected by the fact that by its very nature only a limited number of people are likely to avail themselves, or are perhaps even capable of availing themselves, of its benefits. It is easy, for instance, to imagine a charity which has for its object some form of child welfare, of which the immediate beneficiaries could only be persons of tender age. Yet this would satisfy any test of general public utility. It may be said that it would satisfy the test because the indirect benefit of such a charity would extend far beyond its direct beneficiaries, and that aspect of the matter has probably not been out of sight. Indirect benefit is certainly an aspect which must have influenced the decision of the "cruelty to animal" cases. But, I doubt whether this sort of rationalization helps to explain a branch of the law which has developed empirically and by analogy upon analogy.

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[10] (1805) 10 Ves. 522, 532.

It is, however, in my opinion, particularly important in cases falling within the fourth category to keep firmly in mind the necessity of the element of general public utility, and I would not relax this rule. For here is a slippery slope. In the case under appeal the intended beneficiaries are a class within a class; they are those of the inhabitants of a particular area who are members of a particular church: the area is comparatively large and populous and the members may be numerous. But, if this trust is charitable for them, does it cease to be charitable as the area narrows down and the numbers diminish? Suppose the area is confined to a single street and the beneficiaries to those whose creed commands few adherents: or suppose the class is one that is determined not by religious belief but by membership of a particular profession or by pursuit of a particular trade. These were considerations which influenced the House in the recent case of *Oppenheim.*[13] That was a case of an educational trust, but I think that they have even greater weight in the case of trusts which by their nominal classification depend for their validity upon general public utility.

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[11] [1951] A.C. 297; [1951] 1 T.L.R. 118; [1951] 1 All E.R. 31.

[12] [1949] Ch. 529; 65 T.L.R. 383; [1949] 2 All E.R. 6.

It is pertinent, then, to ask how far your Lordships might regard yourselves bound by authority to hold the trusts now under review valid charitable trusts, if the only question in issue was the sufficiency of the public element. I do not repeat what I said in the case of *Williams' Trustees* v. *Inland Revenue Commissioners*[14] about *Goodman* v. *Mayor of Saltash*[15] and the cases that closely followed it. Further consideration of them does not change the view that I then expressed, which in effect indorsed the opinion of the learned editor of the last edition of Tudor on Charities. More relevant is the case of *Verge* v. *Somerville.*[16] In that case, in which the issue was as to the validity of a gift "to the trustees of the "Repatriation Fund or other similar fund for the benefit of New "South Wales returned soldiers," Lord Wrenbury, delivering the judgment of the Judicial Committee, said[17] that, to be a charity, a trust must be "for the benefit of the community or of an "appreciably important class of the community. The inhabi-"tants," he said, "of a parish or town or any particular class "of such inhabitants, may, for instance, be the objects of such a "gift, but private individuals, or a fluctuating body of private "individuals, cannot." Here, my Lords, are two expressions: "an appreciably important class of the community" and "any

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[13] [1951] A.C. 297.
[14] [1947] A.C. 447.
[15] (1882) 7 App.Cas. 633.
[16] [1924] A.C. 496; 40 T.L.R. 279.
[17] [1924] A.C. 496, 499.

"particular class of such inhabitants," to which in any case it is not easy to give a precise quantitative or qualitative meaning. But I think that in the consideration of them the difficulty has sometimes been increased by failing to observe the distinction, at which I hinted earlier in this opinion, between a form of relief extended to the whole community yet by its very nature advantageous only to the few and a form of relief accorded to a selected few out of a larger number equally willing and able to take advantage of it. Of the former type repatriated New South Wales soldiers would serve as a clear example. To me it would not seem arguable that they did not form an adequate class of the community for the purpose of the particular charity that was being established. It was with this type of case that Lord Wrenbury was dealing, and his words are apt to deal with it. Somewhat different considerations arise if the form, which the purporting charity takes, is something of general utility which is nevertheless made available not to the whole public but only to a selected body of the public—an important class of the public it may be. For example, a bridge which is available for all the public may undoubtedly be a charity and it is indifferent how many people use it. But confine its use to a selected number of persons, however numerous and important: it is then clearly not a charity. It is not of general public utility: for it does not serve the public purpose which its nature qualifies it to serve.

Bearing this distinction in mind, though I am well aware that in its application it may often be very difficult to draw the line between public and private purposes, I should in the present case conclude that a trust cannot qualify as a charity within the fourth class in *Income Tax Commissioners* v. *Pemsel*[18] if the beneficiaries are a class of persons not only confined to a particular area but selected from within it by reference to a particular creed. The Master of the Rolls in his judgment cites a rhetorical question asked by Mr. Stamp in argument[19]: "'Who "'has ever heard of a bridge to be crossed only by impecunious "'Methodists?'" The reductio ad absurdum is sometimes a cogent form of argument, and this illustration serves to show the danger of conceding the quality of charity to a purpose which is not a public purpose. What is true of a bridge for Methodists is equally true of any other public purpose falling within the fourth class and of the adherents of any other creed.

[18] [1891] A.C. 531.

[19] [1953] Ch. 504, 519; [1953] 2 All E.R. 233.

The passage that I have cited from *Verge* v. *Somerville*[20] refers also (not, I think, for the first time) to "private individuals" or a "fluctuating body of private individuals" in contradistinction to a class of the community or of the inhabitants of a locality. This is a difficult conception to grasp: the distinction between a class of the community and the private individuals from time to time composing it is elusive. But, if it has any bearing on the present case, I would suppose that the beneficiaries, a body of persons arbitrarily chosen and impermanent, fall more easily into the latter than the former category.

I conclude that on this ground also I should decide this case against the respondents even if I were otherwise in their favour, and will only add that in coming to this conclusion I find myself in agreement with Babington L.J. in the *Londonderry* case[21] to which I have already referred.

I move that the appeals be allowed accordingly. The costs of all parties will be paid by the appellants in accordance with the undertaking previously given.

LORD PORTER. My Lords, I concur with the opinion of the noble Lord on the Woolsack in holding that the trusts declared in the two matters now under appeal are not charitable. Like Lord Tucker, however, I desire to express no opinion as to whether the beneficiaries constitute a sufficient class for the purposes of class 4 of *Pemsel's* case.[22]

LORD REID. My Lords, the first question to be determined is the proper interpretation of the trust purposes set out in the conveyances of the mission hall and lecture room and of the playing field. I shall take first the conveyance of the playing field. The phraseology is in this deed more concise and somewhat easier to follow. The essential part of it for the present purpose is as follows: [His Lordship read clause 2 (*a*) and continued:] This begins by setting out the object to be attained, "the "moral social and physical well-being of persons resident in the "County Boroughs of West Ham and Leyton." There follows a limitation to a section of those persons. I must return to this, but as this limitation throws no light on the nature of the trust purposes I need not deal with it now. Then there follows the method, and the only permissible method, by which the object is to be attained: first "by the provision of facilities for moral

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[20] [1924] A.C. 496, 499.

[21] [1946] N.I. 178; 27 T.C. 431.

[22] [1891] A.C. 531, 583.

" social and physical training and recreation " and then " by " promoting and encouraging all forms of such activities " (which must mean the activities of moral social and physical training and recreation) " as are calculated to contribute to the health " and well-being " of the beneficiaries. I think that " facilities " here means equipment and instruction or supervision suitable for the activities mentioned and it is, I think, plain that the playing field can only be used for activities which are promoted or encouraged by the leaders. The real question is what are the nature and scope of the activities which the leaders are required or permitted to promote or encourage, and whether the conduct of any of those activities would go beyond what can properly be regarded as the fulfilment of a charitable purpose. The proviso, which I have not quoted, throws little independent light on this question and it must, in my opinion, be determined by construing the words which I have quoted in the light of the whole circumstances disclosed in the deed.

The leaders are, in my view, required to bear in mind that the donor's objective is threefold—to promote the moral and social and physical well-being of the beneficiaries: they must not pursue one of these purposes in isolation. Of course, some activities will contribute more to one and some more to another of these purposes, but they must not promote or encourage any activity which may be detrimental to any of these three purposes—indeed, they must prevent any such activity. They are expressly required only to promote or encourage activities which are calculated to contribute to health and well-being: it is not enough that a particular activity should not be harmful to health or well-being, it must only be promoted or encouraged if it is such as to contribute to health and well-being, and, of course, it would only be possible to conduct activities of a kind which the nature of the premises—a playing field—permits.

My Lords, it is said that the words which I have quoted afford so vague a description of the permitted activities that a court could not determine what is authorized and what is not, or, alternatively, that these words are so wide as to authorize activities which could not come within anything that the law regards as charitable, so I must now consider what the law does regard as charitable. We were referred by the Attorney-General to a number of Acts of Parliament, extending over nearly a century, in which Parliament has regarded the provision of facilities for recreation for adults as a charitable purpose. The first was the Recreation Grounds Act, 1858, under which land conveyed for the "regulated recreation" of adults or for playgrounds for children was, I think, clearly regarded as land conveyed for a charitable purpose. It would appear that Parliament assumed that this was the law, but if Parliament was wrong in so assuming, then it would be necessary in order to give effect to the Act that there should be implied an enactment that land conveyed in terms of the Act should be treated as land held for charitable purposes.

The most important Act is the Mortmain and Charitable Uses Act, 1888. This Act, in my judgment, enacts that the dedication of any park, garden or other land to "the recreation of the public" is a charitable purpose and is within the meaning, purview and interpretation of the preamble to the Act of 43 Eliz. 1, c. 4. The drafting of the Act of 1888 is somewhat unusual and it requires careful examination. Section 13 (1) repeals the whole of the Act of Elizabeth, including the preamble, and then enacts by subsection (2): "Whereas by the preamble to the Act of the forty-third year "of Elizabeth chapter four (being one of the enactments hereby "repealed) it is recited as follows": [then the preamble is set out in full]: "and whereas in divers enactments and documents reference is made to charities within the meaning purview and interpretation of the said Act: Be it therefore enacted that references "to such charities shall be construed as references to charities "within the meaning purview and interpretation of the said preamble." Part II of the Act is headed "Charitable Uses" and begins by enacting in section 4 (1) that: "Subject to the savings "and exceptions contained in the Act, every assurance of land to "or for the benefit of any charitable uses . . . shall be made in "accordance with the requirements of the Act, and unless so made "shall be void." Then in Part III, headed "Exemptions," section 6 enacts that Parts I and II of the Act shall not apply (subject to a limitation which is not material) to an assurance of land for the purposes only of (inter alia) a public park, and by the definition in section 6 (4) (i) "'public park' includes any park, garden, or "other land dedicated or to be dedicated to the recreation of the "public." It is possible that before 1888 a conveyance of a park to trustees for the express purpose that it should be held and maintained in perpetuity for the recreation of the public might not have been held to be a conveyance for a charitable purpose: the gift would benefit rich and poor alike and that whether or not they are subject to any disability, and recreation must here include the use of the land by members of the public for mere relaxation and pleasure. But the whole of the provisions of the Act must be read together and, unless the ordinary principles of statutory construction are to be disregarded, the words taken from the preamble of the statute of Elizabeth and enacted in section 13 as the measure of charitable purpose must be construed in light of the earlier provisions of the Act which make the express purpose of holding " any park garden or other land " for the recreation of the public a charitable purpose. I would agree that any " other land " must be ejusdem generis with parks and gardens. Recreation is a very wide term, but only certain types of recreation can be pursued or enjoyed in a park or garden. It may be that as regards other types of land or buildings where a greater variety of types of recreation could be pursued, merely requiring that they should be held for the recreation of the public would not be a charitable purpose. But, in my judgment, the Act of 1888 clearly establishes that a gift for the purpose of public recreation of subjects on which the only possible types of recreation are those which could be enjoyed in the open air in a park or garden is a gift for a charitable purpose. And, if that be so, I cannot see how it could be denied that a gift of money to be used to promote or facilitate the enjoyment of public recreation on such land is also a gift for a charitable purpose. I therefore agree with the decision in *In re Hadden.*[23] It was followed in two unreported cases to which we were referred: in *In re Foakes*[24] in 1933 Luxmoore J. held that a bequest of certain fields and a barn (together with a sum for their upkeep) for use as a recreation ground was a valid charitable gift, and in *In re Chesters*[25] in 1934 Bennett J. held that a bequest of money to provide public recreation or playgrounds for the children was a valid charitable gift.

In re Nottage[26] is clearly distinguishable: money was bequeathed to provide annually a cup for yacht racing, so the only possible beneficiaries were yacht owners who would be somewhat strange objects of charity. But what the appellants found on is the reasoning in the Court of Appeal to the effect that encouragement of a mere sport or game is not charitable though the sport or game may be beneficial to the public. No doubt that is true in the main, but it cannot apply to the provision or support of playing fields: yacht racing is far removed from the kind of recreation which Parliament has declared to be charitable. And a charitable purpose such as education may well be achieved in part at least by promoting sport or games. The emphasis is on

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[23] [1932] 1 Ch. 133; 48 T.L.R. 9.

[24] (1933) Feb. 21, unrep.

[25] (1934) July 25, unrep.

[26] [1895] 2 Ch. 649; 11 T.L.R. 519.

mere sport or games, and I cannot suppose that any of the learned judges had in mind the Acts of Parliament dealing with recreation or would have denied that the encouragement of games as a means to achieve a charitable purpose for those who took part in them was quite a different matter.

As regards recreation, the only other Act to which I need refer is the Open Spaces Act, 1906. Section 3 provides for land held by trustees on trust for the purposes of public recreation being transferred to a local authority and for the conditions of the trust being varied with the approval of the Charity Commissioners. And section 5 (1) provides that in certain circumstances the owner of an open space may convey his estate or interest in it to a local authority " in trust for the enjoyment of the public " and such a conveyance must be for a charitable purpose if it is to be valid.

I am therefore of opinion that the purpose set out in the present deed for the provision of facilities for recreation and for its promotion and encouragement is a valid charitable purpose unless the class of beneficiaries is too narrow—a matter to which I shall return. I can find no distinction between a playing field and a park or garden, for it is, I think, common knowledge that certain games are habitually played in public parks, and the dedication to the recreation of the public authorized by the Act of 1888 must, in my view, have permitted the playing of games such as are played on a playing field.

But I think that the matter can be dealt with on broader lines. I would refer to the passage from Tyssen on Charitable Bequests at p. 5, quoted with approval by my noble and learned friend Lord Simonds in *National Anti-Vivisection Society* v. *Inland Revenue Commissioners* [27]: " ' One by one, the question of the " ' validity of such trusts was brought before the Court of " ' Chancery . . . It considered only this. Having regard to all " ' legislative enactments and general legal principles is it or is it " ' not for the public benefit that property should be devoted for " ' ever to fulfilling the purpose named? If the court considered " ' that it was not for the public benefit, it held the trust alto- " ' gether void.' " It appears to me that the court in determining what is for the public benefit must be guided by the views of Parliament as embodied in Acts of Parliament, and, unless any general legal principle prevents it, courts should recognize as charitable purposes not only the precise purposes mentioned in

[27] [1948] A.C. 31, 64; 63 T.L.R. 424; [1947] 2 All E.R. 217.

the statutes but others so closely resembling them that they cannot reasonably be distinguished. If that be right, then recreation on a playing field is, to my mind, not distinguishable from recreation in a public park. And if the promotion of recreation on a playing field is a charitable purpose, a fortiori I would think the promotion of moral, social and physical training there to be a charitable purpose.

But as this latter purpose is said to be too vague I must examine it in more detail. The phrase "social and physical training" was not the invention of the donor in this case. It occurs in section 86 of the Education Act, 1921, which provides that "For the purpose of supplementing and reinforcing the instruction and social and physical training provided by the public system of education" an education authority may make arrangements to supply or maintain or aid the supply or maintenance of, inter alia, "other facilities for social and physical training in the day or evening." This was extended by section 6 of the Physical Training and Recreation Act, 1937, so as to permit this to be done for persons of whatever age whether attending any educational institution or not. And in the Education Act, 1944, it is provided by section 53 (1) that "It shall be the duty of every local education authority to secure that the facilities for primary secondary and further education provided for their area include adequate facilities for recreation and social and physical training," and "further education" includes (section 41 (*b*)) "leisure-time occupation, in such organized cultural training and recreative activities as are suited to their requirements, for any persons over compulsory school age who are able and willing to profit by the facilities provided for that purpose."

My Lords, with these examples of its use before him, the donor in the present case might well suppose that the phrase "social and physical training" has an ascertainable meaning, and, if it has, the addition of the word "moral" could not vitiate the gift. I do not say that because a phrase is habitually used in Acts of Parliament it necessarily follows that it must have a precise meaning, but I would not readily hold that it is beyond the capacity of a court to determine the meaning of such a phrase with sufficient precision to enable it to determine whether any particular case falls within or outside its scope.

It is, of course, necessary that the trust purposes should be sufficiently precise to enable a court to determine, if a question should arise, whether a particular activity is authorized by them or not, and " . . . if the property, as Sir William Grant said in

" *James* v. *Allen*,[28] ' might consistently with the will be applied " ' to other than strictly charitable purposes, the trust is too " ' indefinite for the court to execute ' " (*per* Lord Macnaghten in *Dunne* v. *Byrne* [29]). But the best way to show that the purposes are too vague is to find an hypothetical case where it could not be determined with reasonable certainty whether the case is within the purposes or not, and the best way to show that the purposes are too wide to be charitable is to find an hypothetical case which would be within the purposes but beyond the scope of charity. Nevertheless, counsel for the appellants refrained, no doubt for good reason, from submitting any such case; none was suggested in argument, and I can find none myself. It may be that the phrase " social training," apart from any context, would be too vague, but in this context I see no great difficulty. The word " social " taken alone has acquired a variety of meanings, but to my mind social training in this context plainly means training calculated to make a person more fit to associate with his fellows in society or the community in a God-fearing, civilized and law-abiding way, and that surely is one of the chief aims of all education. In *In re Compton* [30] the money bequeathed was " to " be used to fit the children to be servants of God serving the " Nation." The bequest failed because the beneficiaries were only a fluctuating body of private individuals, but there was no suggestion that these words were too vague if the class of beneficiaries had been sufficient. Lord Greene M.R. said [31]: " The " words are most apt to describe the ideals of such an education " as that for which Dr. Arnold stood, and which, at any rate " since his time, have always been regarded as the dominant pur" pose of a public school education." In my opinion, the words in the present case are no more vague than, and not essentially different from, those to which Lord Greene referred. It is true that in that case the words referred to pupils and in the present case they refer to persons of any age who can take advantage of a playing field. But education does not stop at any age. Recreation by itself may not be an educational purpose, but moral, social and physical training is. At least I cannot think of any activity which would come within those words but would not be educational in character, and I adopt the words of Lord Greene M.R. in *In re Strakosch* [32]: " If the object and the means indicated are

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[28] (1817) 3 Mer. 17, 19.

[29] [1912] A.C. 407, 411.

[30] [1945] Ch. 123; 61 T.L.R. 167; [1945] 1 All E.R. 198.

[31] [1945] Ch. 123, 127.

[32] [1949] Ch. 529, 539.

"clearly charitable then the court is not astute to look for "possible but subsidiary non-charitable means which might be "within the words used." I note that in a recent case, *In re Webber*,[33] Vaisey J. had no doubt that furthering the Boy Scouts Movement was an educational and therefore charitable purpose.

In some context social training might mean training in those arts and graces which are sometimes supposed to facilitate admittance to certain more exclusive circles of society, but that is not the meaning here. On a playing field a person can learn the value of endurance and perseverance, of assiduous practice, of unselfish association in a team, and of winning with modesty and losing with a good grace, and to my mind that is the kind of moral and social training which the donor's words mean in this deed and in the Acts from which they were taken. I did not understand it to be argued that physical training was too vague a phrase, and if Parliament has enacted that providing for recreation in a public park is charitable it would indeed be remarkable that the law should hold that provision for outdoor training is not a charitable purpose. With all respect to your Lordships who think otherwise, I cannot feel any substantial doubt that the purposes of this deed are charitable and are sufficiently clearly stated to be enforceable.

But I find the case of the mission hall more difficult. The trust purposes here are almost identical with those for the playing field, the only material difference being the substitution of the word "religious" for "moral" and the insertion of an additional purpose for the provision of facilities for religious services and instruction, which is clearly charitable. But my doubt arises with regard to recreation. The possible forms of recreation in a hall are very different from those on a playing field, and it does not appear that Parliament has ever declared indoor recreation to be a charitable purpose. It is well settled that the provision of entertainment or amusement is not by itself a charitable purpose; but if the dominant purpose of the trust is charitable in character the fact that recreation is provided as an adjunct to that purpose does not destroy the charitable character of the trust. That appears to me to have been recognized in *Inland Revenue Commissioners* v. *City of Glasgow Police Athletic Association*,[34] and I may also cite *In re Mariette*,[35] where providing fives courts for a school was held to be charitable.

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[33] [1954] 1 W.L.R. 1500; [1954] 2 All E.R. 712.

[34] [1953] A.C. 380; [1953] 1 All E.R. 747.

[35] [1915] 2 Ch. 284; 31 T.L.R. 536.

In the present case I have already pointed out that the leaders must endeavour to promote the religous and social and physical well-being of the beneficiaries and only permit such activities as are calculated to contribute to their health and well-being, and the only reference to recreation is in the passage " by the provision of facilities for religious services and instruction and for " the social and physical training and recreation of " the beneficiaries. It was argued that this case is indistinguishable from *Williams' Trustees* v. *Inland Revenue Commissioners*.[36] In that case the decision of the commissioners was that: " ' While certain " ' of its [the Institute's] features conform to the idea of a charity, " ' we have come to the conclusion that these features are not so " ' dominating, nor is the general character of the institute such, " ' as effectively to distinguish it from an ordinary social club.' " In his speech, with which the other noble and learned Lords concurred, my noble and learned friend, Lord Simonds, set out the activities of the institute, which included maintaining a billiards room and tea and games rooms, badminton and table tennis clubs and promoting dances, whist and bridge drives, a weekly social and dance and an annual dinner and garden party: on the other hand, there were lectures and debates, literary and educational classes and a library, and the office served as an information bureau for Welsh people. It is true that the first object of the institute was to create a centre in London for promoting the moral, social, spiritual and educational welfare of Welsh people, and fostering the study of the Welsh language and of Welsh history, literature, music and art, but there followed provision for using the institute for providing a meeting place for Welsh people in London and their friends, where they could obtain facilities for social intercourse, study, reading, rest, recreation and refreshment, and for meetings, concerts, lectures and other forms of instruction, discussion or entertainment. My noble and learned friend said, after examining the authorities[37]: " It is clear, as I have already said, that they [the trustees] " have not applied the income for charitable purposes only, and " I do not doubt that they have applied them strictly in " accordance with their trust."

My Lords, not only do I fully accept that decision, but I do not see how on the facts any other was possible. Recreation and entertainment were so prominent both in the objects and in the activities of the institute that I do not see how they could have been regarded as mere adjuncts of other and charitable purposes. But surely it must be a question of degree whether in any particular case this is so or not, and I find difficulty in reading the trust purposes in this case as permitting the mission hall to be used for anything at all resembling a social club. The hall is to be used primarily for religious services and instruction and social and physical training, which are, in my opinion, charitable purposes. It is open not only to Methodists but to persons likely to become members of the Methodist Church, and attendance is, of course, voluntary. It may well be that some of the beneficiaries would not attend if the activities were severely limited to those which are strictly religious and educational. Any recreation must under the deed be such as is calculated to contribute to the health and well-being of those who attend, and must be sanctioned by the leaders, and, in my view, recreation is only to be promoted or permitted in conjunction with and as ancillary to the other purposes and, therefore, it is not such as to destroy the charitable nature of the trust. If I had thought that the hall could be freely used for mere recreation, entertainment or amusement by persons who take no part in the other activities, I would have reached a different conclusion.

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[36] [1947] A.C. 447, 453.

[37] Ibid. 458.

On this part of the case the appellants relied also on several other authorities, and I must now deal with them. In *Dunne* v. *Byrne* [38] a bequest to the Roman Catholic Archbishop of Brisbane to be used as he might judge most conducive to the good of religion was held not charitable. I think that this decision was inevitable because the whole of the money might well have been used for a non-charitable purpose. "In *Cocks* v. *Manners* [39] "there is the well-known instance of the dedication of a fund to "a purpose which a devout Roman Catholic would no doubt "consider 'conducive to the good of religion,' but which is "certainly not charitable" (*per* Lord Macnaghten [40]). But if I have rightly construed the deed of gift of the hall, this property could not be used for any non-charitable purpose because any purpose or use not strictly charitable in itself is purely ancillary to purposes which are charitable. In *Farley* v. *Westminster Bank Ld.*,[41] the bequest was to the vicar and churchwardens "for "parish work." If these words had not been added the bequest would have been charitable, because the law would have implied that the money must be used in the performance of their spiritual duties for strictly religious purposes. But it was held as a matter of construction that the words " for parish work " were enlarging words. Lord Atkin[42] quoted with approval from the judgment of Lord Greene M.R. in the Court of Appeal: " ' It appears to me " ' that, taking them as words of ordinary English, they cover any " ' activity in the parish, any work in the parish which trustees of " ' that character may be expected to perform, whether that work " ' be strictly a religious purpose or strictly a charitable purpose, " ' or whether it be a work considered to be conducive to the good " ' of religion, or considered to be benevolent or generally useful to " ' the inhabitants of the parish or the congregation of the " ' church.' " Once it had been decided that the words were enlarging words and had that meaning, it was clear that the whole of the money could have been devoted to non-charitable purposes, and again that appears to me to be quite different from the present case.

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[38] [1912] A.C. 407.

[39] (1871) L.R. 12 Eq. 574.

[40] [1912] A.C. 407, 410.

[41] [1939] A.C. 430.

Then the appellants relied on the well-known series of cases where expressions such as " charitable or philanthropic," " charitable or public " and " charitable or benevolent " have been considered. In *In re Macduff*,[43] the bequest was " for some one or " more purposes, charitable, philanthropic or ." The blank was held to be immaterial, but the word " philanthropic " was held to be wider than charitable and vague and the bequest was held invalid. Lindley L.J. said[44]: " We must get at something " sufficiently definite to guide the court as to the kind of trust " which it has to execute, and that trust must be of the kind " called technically a charitable trust." And Lopes L.J. said[45]: " Looking at those words, I ask myself whether or not this pro- " perty might not consistently with the will, having regard to the " word ' philanthropic,' be applied to other than strictly charitable " purposes, and I feel compelled to answer that question in the " affirmative. It has been said that nothing can be suggested—no " purpose and no object can be suggested which would come with- " in the meaning of the word ' philanthropic ' which is not also a " charity. If that were so, I think the argument of the Attorney- " General could be maintained; but that is not a view that I am " able to adopt. I think I could suggest many objects which would " come within the word ' philanthropic,' and to which the trustees " would be entitled to apply the money, which are not charitable. " I will not again allude to recreation grounds and grounds devoted " to sport which are not for the poorer classes, but are generally

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[42] [1939] A.C. 430, 435–6.

[43] [1896] 2 Ch. 451; 12 T.L.R. 452.

[44] [1896] 2 Ch. 451, 463.

[45] Ibid. 468–9.

"for rich and poor alike. I think that would be a case." And then he gives another illustration. The appellants found on this reference to recreation grounds, and it is certainly a dictum of some weight. It appears that Lopes L.J. in the course of the argument asked [46]: "Would a gift for the establishment of cricket and "recreation grounds be charitable?" But the question does not seem to have been pursued and the statutes to which we have been referred were not brought to the notice of the court. I wholly accept the rest of the quotation and particularly the method of approach which it sets out.

Cases of bequests for charitable or public purposes are even farther removed from the present case because it is clear that public purposes include purposes which are not charitable. I need not cite authority for the proposition that if the object is predominantly political the gift is not charitable, and I think that it would be generally agreed that in a democratic country political purposes are among the most important, and perhaps the most important, of all public purposes.

I can at this point deal briefly with an argument for the respondents that even if these trusts are not otherwise charitable they are for the relief of poverty and are charitable for that reason. I agree that poverty does not mean destitution and that the relief of poverty can go a good deal farther than supplying the bare necessaries of life, but it cannot extend to supplying everything that one would like people to have for their own good. It is true that under these deeds the benefits are only to be available to "those of insufficient means otherwise to enjoy the advantages "provided," but if the true meaning of the trust purposes is that something like social and athletic clubs can be set up to provide mere sport, games, entertainment and amenities for those who do not wish to take part in the other activities then I think that providing those advantages for those who could not otherwise afford them goes some way beyond the relief of poverty. There are many people well above the poverty line who cannot afford to pay for such advantages. But if I am right in my reading of the trust purposes and in my view of the law, then the element of poverty is not necessary to make them valid charitable purposes.

But holding that the trust purposes are charitable does not mean that the respondents necessarily succeed. Not only must the purposes be charitable but the beneficiaries must be such a class as will bring in that public element which is essential. The beneficiaries here are the members of the Methodist Church who reside in two large county boroughs, and also residents there who in the opinion of the leaders are likely to become members of that Church. I do not think that this latter extension of the class of beneficiaries improves the respondents' case: if members of the Church are not a sufficient class the addition of an indeterminate number of individuals cannot remedy the defect. But, on the other hand, this extension of the class cannot, in my view, create any difficulty: it does not create any uncertainty about who the beneficiaries are. The donor has made the leaders the judges of whether any particular person has the requisite qualification: no doubt the question which they have to determine depends largely on opinion, but the leaders are in a position to form an opinion on the question. The selection of candidates or applicants frequently depends largely on opinion, but that has never, so far as I am aware, been put forward as a reason against the validity of a charitable bequest for assistance to individuals and I see no reason why it should be an obstacle here. And if the members of the Methodist Church constitute a sufficient class it was not argued that the limitation to those members who reside in a particularly large and populous area or to those members of insufficient means to provide the benefits for themselves would make the class insufficient. The argument was boldly advanced that, even if the purposes of these trusts were charitable so that they would be valid trusts if the benefits were open to all, the limitation to Methodists vitiates their charitable character.

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[46] [1896] 2 Ch. 451, 460.

This House recently had occasion to consider this matter in connexion with an educational trust in *Oppenheim* v. *Tobacco Securities Trust Co. Ld.*,[47] and my noble and learned friend, Lord Simonds, then stated the law thus: "It is a clearly established "principle of the law of charity that a trust is not charitable "unless it is directed to the public benefit. This is sometimes "stated in the proposition that it must benefit the community or "a section of the community. Negatively it is said that a trust is "not charitable if it confers only private benefits. . . . These "words 'section of the community' have no special sanctity, but "they conveniently indicate first, that the possible (I emphasize "the word 'possible') beneficiaries must not be numerically "negligible, and secondly, that the quality which distinguishes "them from other members of the community, so that they form "by themselves a section of it, must be a quality which does not

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[47] [1951] A.C. 297, 305–6.

"depend on their relationship to a particular individual. It is "for this reason that a trust for the education of members of "a family, or as in *In re Compton*[48] of a number of families, "cannot be regarded as charitable. A group of persons may be "numerous but, if the nexus between them is their personal relationship to a single propositus or to several propositi, they are "neither the community nor a section of the community for "charitable purposes." I shall also quote, for a reason which will appear later, from the judgment of the Privy Council delivered by Lord Wrenbury in *Verge* v. *Somerville*[49]: "To ascertain "whether a gift constitutes a valid charitable trust so as to "escape being void on the ground of perpetuity, a first inquiry "must be whether it is public—whether it is for the benefit of the "community or of an appreciably important class of the community. The inhabitants of a parish or town, or any particular "class of such inhabitants, may, for instance, be the objects of "such a gift, but private individuals, or a fluctuating body of "private individuals, cannot." The contrast between a section of the community and a fluctuating body of private individuals has been used as the proper test in several cases without any suggestion that it is an inadequate test, and it appears to have its origin in the speech of Lord Cairns in *Goodman* v. *Mayor of Saltash*.[50]

If these are the criteria to be applied in this case, then it was not disputed that members of the Methodist Church are a section of the community and an appreciably important class of the community and are a particular class of the inhabitants of West Ham and Leyton. I would not embark on any theological inquiry, but it appears to me to be beyond doubt that membership of any branch of the Christian Church is a quality which does not depend on the members' relationship to any individual propositus. There may be small sects which are not sufficiently numerous to form an appreciably important class of a community, but no one would suggest that that is true of the Methodist Church. Indeed, I understood counsel for the appellants to admit that the beneficiaries in this case would be a sufficient class to be proper objects for a charitable gift for educational or religious purposes or for the relief of any kind of disability or distress, and that it would not matter in such cases that the benefits were not confined to those who could be said to be in poverty. But the beneficiaries in this case are ordinary people not necessarily suffering from any disability and some at least of the purposes may be neither religious nor educational, and it was argued that in such a case a trust cannot be charitable in the eye of the law unless the benefits are open to the whole community or at least to all the inhabitants of an area. The argument was that while there could be a valid charitable trust of the fourth class in favour of a section of the community consisting of the inhabitants of a particular area, it would not be valid if in favour of a section of the community defined in any other way. I can see no justification in reason for this distinction, but it has often been pointed out that the law of charity is full of anomalies and I must therefore examine the argument.

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[48] [1945] Ch. 123.

[49] [1924] A.C. 496, 499.

[50] 7 App.Cas. 633, 650.

The appellants found this argument on Lord Macnaghten's well-known classification in *Income Tax Commissioners* v. *Pemsel*[51]: " 'Charity' in its legal sense comprises four principal " divisions: trusts for the relief of poverty; trusts for the advance- " ment of education; trusts for the advancement of religion; and " trusts for other purposes beneficial to the community, not falling " under any of the preceding heads." They say that " beneficial " to the community " means beneficial to the whole community. But then they are immediately faced with this difficulty: they admit that a trust for the relief of sick or disabled Methodists could be a valid charitable trust although its benefits were open to all Methodists rich and poor alike but to no one else. But they get over the difficulty by saying that any such trust falls within Lord Macnaghten's first class and that when he said trusts for the relief of poverty he meant to include trusts for the relief of disability or distress whether financial or not. I find it difficult to believe that Lord Macnaghten was ever guilty of such inaccurate use of language and I feel sure that this was not his intention here because on the next page in the Law Reports[52] he refers to the first three classes in these words, " the advancement of religion, or " the advancement of education, or the relief of the poor." The word " poverty " is sometimes loosely or metaphorically used to mean lack of some thing other than money, but no one could say " relief of the poor " if he meant to include relief of disabled people irrespective of their means. But it is said that Lord Macnaghten took his classification from the argument of Sir Samuel Romilly in *Morice* v. *Bishop of Durham*[53] (which can be found quoted by Lindley L.J. in *In re Macduff*[54]). " First, " relief of the indigent; in various ways: money: provisions: " education: medical assistance, etc.; secondly, the advancement

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[51] [1891] A.C. 531, 583.
[52] Ibid. 584.
[53] 10 Ves. 522, 532.
[54] [1896] 2 Ch. 451, 466.

" of learning; thirdly, the advancement of religion; and, fourthly, " which is the most difficult, the advancement of objects of " general public utility." And it is said that " general public " utility " cannot include a case where the beneficiaries are only a class of the community. But the same difficulty arises here again: in which class are we to put a trust for the benefit of disabled Methodists? The appellants again say in the first class, but the word " indigent " appears to me to be as inappropriate as " poor " to include disabled people of ample means. It may be that Sir Samuel Romilly did not have in mind cases of this kind: I have not made a search to see whether any had come before the court at that time. But Lord Macnaghten did not merely copy the words of Sir Samuel Romilly. He made at least one significant alteration, substituting " education " for " learning ": for education is now regarded as wider in scope than learning in the sense in which I think Sir Samuel Romilly used the word. And he omitted the word " general " in the description of the fourth class. I cannot believe that this was due to inadvertence: it seems to me much more likely that he was not satisfied that it should be included.

But a meticulous examination of words used by judges, however eminent, cannot be decisive if these words were used in cases where the present question was in no sense in issue, so I turn to consider the authorities. In *Verge* v. *Somerville*[55] the bequest was " unto the trustees for the time being of the " ' Repatriation Fund ' or other similar fund for the benefit of " New South Wales returned soldiers." There was no such fund in existence, but it was held that this was a valid charitable trust and that a scheme should be settled. The judgment of the Board was delivered by Lord Wrenbury. He made it plain[56] that this case fell within the fourth of Lord Macnaghten's divisions of charity, and he stated the test to be applied in the words which I have already quoted, and I repeat the crucial words[57]: " The " inhabitants of a parish or town, *or any particular class of such* " *inhabitants* (the italics are mine) may, for instance, be the " objects of such a gift." He then posed the question whether if this test is satisfied poverty is a necessary element, and continued[58]: " In argument it was scarcely pressed that it is " necessary, and after the decision in *Goodman* v. *Mayor of* " *Saltash*[59] it was not possible to maintain the general proposition

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[55] [1924] A.C. 496.
[56] Ibid. 503.
[57] Ibid. 499.
[58] Ibid. 500.
[59] 7 App.Cas. 633.

"that it is. A trust or condition in favour of the free inhabitants "of ancient tenements in the borough of Saltash, in accordance "with a usage whereunder they had the privilege of dredging for "oysters, was there held to be a valid charitable trust, and, "obviously, some of the inhabitants might not have been poor." Then he said[60]: "It is a public trust and is to benefit a class of "the community—namely, men from New South Wales who "served in the war and were returned or to be returned to their "native land . . . Their Lordships have no doubt that this is a "charitable purpose. If it were (which in their opinion it is "not) necessary to find that need of assistance is to be a qualification for benefit . . . and if it were necessary to find a reference "to poverty, their Lordships have no difficulty in finding it." Accordingly, the ratio decidendi was that without poverty being a qualification there was a valid charitable trust within Lord Macnaghten's fourth division in favour of a class of the community defined otherwise than by reference to all the inhabitants of any particular area. It is true that there was no discussion of the argument now submitted by the appellants, but that was because it had not then occurred to anyone to raise the question; and if this case stood alone it would not be fatal to the appellants' argument because your Lordships are not bound by decisions in the Privy Council.

But your Lordships are bound by a previous decision in this House, and it appears to me to be unquestionable that in *Goodman* v. *Mayor of Saltash*[61] this House decided that there was a valid charitable trust where there was no question of poverty or disability or of education or religion, and where the beneficiaries were not by any means all the inhabitants of any particular area. Lord Selborne L.C. said[62] that the usage was "confined to a particular class of persons, viz., the 'inhabitants "'of ancient messuages within the borough' (whose number "would not be capable of indefinite increase)." Lord Blackburn based his dissent on the fact that he thought it quite clear that they were not the public at large,[63] and Lord Fitzgerald regarded them as a recognized class within the borough.[64] It is true that some parts of the ratio decidendi in *Goodman's* case[65] have been so modified by subsequent decisions of this House that it would appear that those noble and learned Lords who took part in these decisions did not accept as an inflexible rule that this House is bound by every part of every ratio decidendi in every previous case. But no one has ever suggested that the rule that we are bound by actual decisions of the House is other than absolute and inflexible, and, apart altogether from the ratio decidendi in *Goodman's* case,[65] it appears to me that the actual decision in that case is inconsistent with the appellants' argument. Moreover, if there has been a modification of that ratio decidendi, it has only been with regard to the question whether the trust purposes must be not only public purposes but also of such a nature as to be charitable in character, and on other matters, including that now in question, the case appears to me to be fully authoritative.

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[60] [1924] A.C. 496, 506.

[61] 7 App.Cas. 633.

[62] Ibid. 646.

[63] Ibid. 654.

[64] Ibid. 608.

[65] 7 App.Cas. 633.

I may add that I have found no support for the appellants' submission that Lord Macnaghten's first class can include cases for relief of distress or disability where poverty is not a necessary qualification for receiving benefits. But, besides the authorities I have dealt with, there are a number of expressions or indications of opinion that such cases fall within the fourth class. For example, I think that it clearly appears in *In re Hobourn Aero Components Ld.'s Air Raid Distress Fund*[66] that Lord Greene M.R. thought that the relief of air raid distress would be a good charitable object within the fourth class, and in *Oppenheim's* case[67] Lord Normand referred to this and other cases as being within that class. I shall not trouble your Lordships with further examples.

I must now examine the case of *Londonderry Presbyterian Church House Trustees* v. *Inland Revenue Commissioners.*[68] The appellants relied on it for two purposes: first as an authority on the question whether the trust purposes in this case are charitable in their nature, and secondly, in support of the argument which I am now considering. On the former question much depends on the construction of the particular deed and on that matter I shall be as brief as I can, but the second is a pure question of law and, as this case contains in the judgment of Babington L.J. the only authority which the appellants were able to cite in support of their argument, I must deal with it in more detail.

The trust purposes so far as relevant were "to permit the "same or any part thereof to be used as a hall for meetings "or for social or recreational purposes in connexion with the

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[65] 7 App.Cas. 633.

[66] [1946] Ch. 194, 202, 203; 62 T.L.R. 313; [1946] 1 All E.R. 501.

[67] [1951] A.C. 297, 311.

[68] [1946] N.I. 178; 27 T.C. 431.

"various Presbyterian Churches in the City of Londonderry and "the surrounding district or as a hostel or boarding house or as "a library or for such other purpose or purposes as the board of "governors . . . shall from time to time think fit, it being the "true intention and meaning of these presents that said premises "should be used for the purposes of assisting and helping in the "religious moral social and recreative life of those connected with "the Presbyterian Church . . . in such manner as the said "board of governors . . . shall from time to time think right." These purposes appear to me to be considerably wider than those set out in the conveyance of the hall in the present case. I have already said that I would not have held that trust in this case to be charitable if I had thought that the recreation permitted was not merely ancillary to the other purposes and that the hall could be freely used for recreation and entertainment by those who took no part in the other activities. I think that both the *Londonderry* case [68] and the present case are near the border line. If I could construe the trust provisions in the way in which Lord MacDermott (then MacDermott J.) construed them I would reach the result which he reached, but on the whole I prefer the construction put on these provisions in the Court of Appeal, and on that construction the premises could be used for non-charitable purposes in ways not purely ancillary to the charitable purposes set out in the deed, and it appears that they were in fact so used. I do not find in this case any sufficient answer to the special consideration which I have stated with regard to the hall in the present case. And it appears to me to have no bearing on the present case with regard to the playing field.

On the second question, what is a sufficient class of the community, Lord MacDermott and Andrews C.J. rejected the argument for the present appellants for reasons with which I am in substantial agreement, but Babington L.J. took a different view. He said [69]: "The Presbyterian church is not a section "of the public. Its members, or those of its members to be "benefited under this trust are no doubt members of the public "but they are not a section of it any more than were the work "people in *In re Drummond* [70] and the trust is therefore not a "trust for general public purposes but for a fluctuating body "of private individuals . . . Considerable confusion has, I think,

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[68] [1946] N.I. 178; 27 T.C. 431.

[69] [1946] N.I. 178, 196–9; 27 T.C. 431, 451–2.

[70] [1914] 2 Ch. 90; 30 T.L.R. 429.

"arisen from a failure to distinguish between the public element "in cases under the first three of Lord Macnaghten's categories and the fourth. Under the first three the charitable "intention must be established, i.e., for the relief of poverty, "the advancement of religion or the advancement of education. "The objects must be of a public nature, as Fitzgibbon L.J. says, "but it is immaterial under these categories how the class is "delineated provided it is adequate in numbers and importance. "In cases falling within category four, however, there can be "no charity until it is shown that the gift is to or for the "benefit of the public or a section of the public . . . If this trust "had been for the advancement of religion the class would "clearly be sufficient in numbers and importance to sustain it "as a good charitable trust though it only benefits a particular "faith the members of which do not constitute a section of the "public."

My Lords, the reasoning in the passage which I have quoted appears to me to be in direct conflict with the decision of this House in *Oppenheim's* case,[71] and it is right to say that that case had not been reported when Babington L.J. gave his judgment. In *Oppenheim's* case [71] the trust was for the advancement of education, but the decision of this House was that it is not enough that the class of beneficiaries is numerous, it must also be a section of the community, and the ratio decidendi applies equally to a trust for the advancement of religion. So if the reasoning of Babington L.J. is correct and the members of a religious denomination do not constitute a section of the public (or the community) then a trust solely for the advancement of religion or of education would not be a charitable trust if limited to members of a particular church. Of course, the appellants do not contend that that is right: they could not but admit that the members of a church are a section of the community for the purpose of such trusts. But they maintain that they cease to be a section of the community when it comes to trusts within the fourth class. Babington L.J. gives no support to that contention, but the appellants cannot succeed on this argument unless that contention is sound. Poverty may be in a special position but otherwise I can see no justification in principle or authority for holding that when dealing with one deed for one charitable purpose the members of the Methodist or any other church are a section of the community, but when dealing with another deed for a different charitable purpose they are only a fluctuating body of private individuals. I therefore reject this argument and on the whole matter I am of opinion that this appeal ought to be dismissed.

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[71] [1951] A.C. 297.

LORD TUCKER. My Lords, Jenkins L.J.'s analysis of the two conveyances in question led him to the conclusion that the object of the first trust was the promotion of the religious, social and physical well-being of persons resident in the County Boroughs of West Ham and Leyton, and of the second trust the promotion of the moral, social and physical well-being of persons so resident who are considered by the leaders of the Stratford Newtown Methodist Mission to be likely to become members of the Methodist Church and to be of insufficient means otherwise to enjoy the advantages provided by the deed, and that the remaining provisions merely prescribe the means whereby these objects were to be attained.

My Lords, I agree with this construction of the deeds, and I am also in agreement with all the members of the courts below in holding that these trusts cannot be regarded as trusts for the relief of poverty.

In considering whether they fall within the fourth class of *Pemsel's* case,[72] as the Court of Appeal have held, or within class 2—trusts for the advancement of education—as was submitted in the alternative for the first time before your Lordships, the words which, in my view, create the difficulty are "the "promotion of social well-being." This is an extremely vague phrase which may have different meanings to different minds and may include things considered by some, but not by others, to be advantageous. It would appear to cover many of the activities of the so-called "welfare State" and to include material benefits and advantages which have little or no relation to social ethics or good citizenship, concepts which are themselves not easily definable. I find it impossible to construe these trusts in such a way as to restrict the operation of this language to promoting or inculcating "those standards of secular conduct and behaviour . . . "expected of a good neighbour and a good citizen" as the Court of Appeal have done.[73] It would, I feel, be a considerable extension of any previous decision to allow language of this vague nature to qualify a trust for inclusion as charitable within the spirit and intendment of the preamble to the Statute of Elizabeth.

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[72] [1891] A.C. 531, 583.

[73] [1953] Ch. 504, 523.

H. L. (E.)

1954–55

INLAND REVENUE COMMISSIONERS *v.* BADDELEY.

Lord Tucker

The present case is not unlike that of *Londonderry Presbyterian Church House Trustees* v. *Inland Revenue Commissioners.*[74] The language is not, of course, identical. In the Irish case the relevant words were: " Upon trust to permit the " same or any part thereof to be used as a hall for meetings or " for social or recreational purposes in connexion with the various " Presbyterian Churches in the City of Londonderry and the " surrounding district or as a hostel or boarding house or as a " library or for such other purpose or purposes as the board of " governors . . . shall from time to time think fit, it being the " true intention and meaning of these presents that said premises " shall be used for the purposes of assisting and helping the " religious moral social and recreative life of those connected " with the Presbyterian Church in the City of Londonderry and " surrounding district in such manner as the said board of " governors . . . shall from time to time think right."

Andrews C.J. in the course of his judgment in the Court of Appeal said [75]: " Judicial minds have operated not always con- " sistently on facts admittedly different; and the result can only " be described as in a measure chaotic. I shall simply content " myself with saying that I find nothing in the statutes referred " to which would assist me in holding that the trusts in the " present case for religious, moral, social and recreative purposes, " excluded as I have held them to be from Lord Macnaghten's " third class, fall within the fourth class as a valid charitable " trust. The test is not whether the objects or purposes aimed " at are beneficial to or receive the general acceptance of the " community. It is simply whether they conform or not to the " essential of a legal charity." My Lords, I would respectfully adopt this language and apply it to the present case.

For this reason, which is I think also in conformity with the decision of this House in *Williams' Trustees* v. *Inland Revenue Commissioners,*[76] I would allow this appeal without expressing any view on the question whether the beneficiaries form a sufficient class for the purposes of class 4 of *Pemsel's* case.[77]

LORD SOMERVELL OF HARROW. My Lords, I am unable to accept the contruction put on these deeds by the Court of Appeal. Before addressing myself to the words, I will make one or two

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[74] [1946] N.I. 178; 27 T.C. 431.

[75] [1946] N.I. 178, 188; 27 T.C. 431, 446.

[76] [1947] A.C. 447.

[77] [1891] A.C. 531, 583.

H. L. (E.)

1954–55

INLAND REVENUE COMMISSIONERS *v.* BADDELEY.

Lord Somervell of Harrow.

general observations. I agree with the Court of Appeal in rejecting the argument that as a matter of law a trust to qualify under Lord Macnaghten's fourth class must be analogous to the repair of " bridges portes havens causwaies seabankes and highewaies," being the examples given in the preamble outside the three main categories of poverty, religion and education. The words used by the Court of Appeal in *In re Strakosch*[78] do not afford any basis for this argument, as Jenkins L.J. demonstrated. The reference was to show that the repair of a bridge is charitable notwithstanding its use by rich as well as poor. The submission is inconsistent, in my opinion, with some of the cases decided under the fourth head. I think, however, that a trust to be valid under this head would normally be for the public or all members of the public who needed the help or facilities which the trust was to provide. The present trust is not for the public.

I cannot accept the principle submitted by the respondents that a section of the public sufficient to support a valid trust in one category must as a matter of law be sufficient to support a trust in any other category. I think that difficulties are apt to arise if one seeks to consider the class apart from the particular nature of the charitable purpose. They are, in my opinion, interdependent. There might well be a valid trust for the promotion of religion benefiting a very small class. It would not at all follow that a recreation ground for the exclusive use of the same class would be a valid charity, though it is clear from the Mortmain and Charitable Uses Act, 1888, that a recreation ground for the public is a charitable purpose.

This trust not being for the public, the necessary element of public benefit, if present, must be found in the purposes. I will deal with the first deed, the wording of which is more favourable to the respondents' argument in that it contains an express reference to religious services and instruction. It is not, however, suggested that the trust as a whole can be treated as one for the promotion of religion, the other purposes being merely ancillary. I agree with the courts below that the " means " clause has no application to the facilities for religious services and instruction. The clause is important in that it implies that the advantages, social, physical and recreational, are a question of means. The more pecunious members can get them elsewhere. The leaders would, no doubt, organize the social and recreational activities but, if it was intended that their spiritual and moral

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[78] [1949] Ch. 529.

Lord Somervell of Harrow.

influence should play an important part, the advantages would not have been referred to as a question of means. The word "well-being," though qualified by "religious" as well as "social and physical," means primarily, in my opinion, a happy or contented state. Social well-being would be promoted when people were happy together—an important factor in institutional life. Physical well-being is promoted by exercise or recreation and the health and contentment which normally follow. Social training is an ambiguous expression and may well be too vague. Its meaning to me is training in social behaviour, in manners. I think, therefore, that these words entitle the trustees to run a social centre in the ordinary sense for the Methodists and prospective Methodists as set out in the deed. On this view the trust, limited as it is, is plainly not a charity, and the Court of Appeal would as I read their judgments have so held.

Had I been able to agree with the more charitable construction placed on the deeds by the Court of Appeal I should have felt great difficulty in reconciling their conclusion with the decision of this House in *Williams' Trustees* v. *Inland Revenue Commissioners.*[79] I am aware of the differences that could be emphasized, but on the whole I think the deed in *Williams'* case was nearer the borderline than the present deeds.

The Attorney-General as amicus curiae made certain submissions as to recreation grounds for the public and village halls. Nothing that I have said is to be taken as throwing any doubt or light on these matters. Where a ground or hall is for the public different considerations clearly arise.

I would allow the appeals.

Appeals allowed.

Solicitors: *Solicitor of Inland Revenue; Kenneth Brown, Baker, Baker; Treasury Solicitor.*

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[79] [1947] A.C. 447.

M. TAKIM & CO. . . . . . . APPELLANTS;

AND

FAZAL KASSAM VELJI . . . . RESPONDENT.

J. C.*

1955 *April* 19.

ON APPEAL FROM THE COURT OF APPEAL FOR EASTERN AFRICA.

East Africa—Revenue—Stamp duty—Time of stamping—"At or before "the time of execution"—Meaning of "at"—Contract—Sale of goods—"Local contract note"—"Memorandum of an agreement" —Not a "broker's note"—Exemption from stamp duty—Admissible in evidence—Sale of Goods Decree (Laws of Zanzibar, 1934, *c.* 81), *s.* 3 (1)—*Stamp Decree,* 1940 (*No.* 5 *of* 1940) (*Zanzibar*), *ss.* 4, 19, 39; 1*st Sch., arts.* 5 (1) (*a*), 41.

Revenue. "At"—"At or before the time of execution."

A "Local contract note" for the sale of a quantity of cloves stated that the seller had "sold the goods" to the buyers through a named broker (who was acting for the buyers). The contract note then set out, inter alia, the description, quantity and price of the goods, and under the heading "Other conditions" stated, inter alia, that "The seller and the buyer have made bargain with "signature. That is all." There then followed the signature of the broker, and below it was stated: "Note.—The above-mentioned "goods have been sold on the conditions written above, which are "acceptable to us . . ." and that note was signed by the seller and by the buyers.

On a claim by the buyers for damages for non-delivery of the cloves, the seller pleaded that the document was a note or memorandum made by a broker within the meaning of article 41 of the First Schedule to the Zanzibar Stamp Decree, 1940, which provided for a stamp duty of 20c. in the case of a "Note or memorandum, "sent by a broker or agent to his principal intimating the "purchase or sale on account of such principal—(*a*) of any goods "of the amount or value of 40s. or over," and that it had not been duly stamped:—

Held, that the document until signed by the parties was not an intimation by the broker of a purchase or sale, but was a draft of proposed terms to which the parties by signing could agree, and was therefore outside article 41, and the seller was liable for breach of contract.

Vagani & Co. v. *Lakhani Ld.* (1949) 16 E.A.C.A. 5 considered.

Quaere the meaning of the preposition "at" in section 19 of the Stamp Decree requiring certain documents to be stamped "at "or before the time of execution."

Judgment of the Court of Appeal for Eastern Africa reversed.

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* *Present*: LORD TUCKER, LORD COHEN, LORD SOMERVELL OF HARROW and MR. L. M. D. DE SILVA.

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1955

M. TAKIM & Co.
v.
VELJI.

APPEAL (No. 13 of 1954) from a decree of the Court of Appeal for Eastern Africa (November 1, 1952) reversing a decree of His Britannic Majesty's Court for Zanzibar (November 28, 1951).

By their plaint, dated May 15, 1951, the appellants alleged that by a contract in writing dated June 20, 1950, they bought from the respondent 20,000 lb. of fair quality cloves at the price of 95s. per 100 lb. to be delivered between November 1 and 30, 1950. The respondent did not deliver any of the cloves. The appellants claimed as damages 8,800s., being the difference between the contract price and the market price of cloves on November 30, 1950. By his amended defence, dated July 20, 1951, the respondent denied that the document of June 20, 1950, had any legal effect; he alleged that it was a note or memorandum made by a broker and, not being duly stamped, was not admissible in evidence or enforceable in law.

The trial judge (Gray C.J.) gave judgment for the present appellants (plaintiffs) for 8,750s. That decision was reversed by the East African Court of Appeal (Nihill P., Worley V.P. and Murphy Ag.C.J.).

The alleged contract was in the following form:—

"LOCAL CONTRACT NOTE

"Contract Note No. 24/50. "Original } Copy
"Duplicate
"Triplicate

"Broker MOHAMED SALEH BHALOO.
"MOHAMED SALEH BHALOO broker,
"Zanzibar.

"Zanzibar D.20.6.50.

"Seth F. K. Velji has, on the following conditions, sold the "goods mentioned in this contract to Seth M. Takim & Co. "through broker Mohamed Saleh Bhaloo.

"Kind of goods .. Zanzibar or Pemba cloves.
"Quantity .. .. Nett 20,000 lb. in words twenty thousand complete.
"Size or weight .. —
"Packing .. .. In gunny bags.
"Delivery .. .. Customs or godown.
"Samples .. .. Fair quality.
"Dutiable or transhipment —
"Price .. .. Shs. 95/– in words ninety-five complete; for 100 lb.
"Period .. .. —

"Ready or coming ..	November seller's option.
"Shipment	—
"Other conditions ..	Cloves nett 20,000 lb. in words "twenty thousand of the current year from D. 1st November up to 20th November 1950, whenever seller gives delivery buyer is to weigh at the above price. During the period whatever delivery seller gives the buyer is to pay the account of that much. In the end the seller is to give complete delivery up to the date written in contract. The seller is to give the buyer two days' notice in advance. The seller and the buyer have made bargain with signature. That is all.

"Signature of broker (Sgd.) MOHAMED SALEH BHALOO.

"NOTE.—The above-mentioned goods have been sold on the conditions written above, which are acceptable to us (If) goods do not arrive due to the reasons of war or accident then seller does not remain responsible but when goods arrive according to shipment written in the contract then buyer is to remove.

"Seller's signature ..	(Sgd.) FAZAL KASSAM VELJI.
"Buyer's signature ..	(Sgd.) M. TAKIM & CO. Akbar."

The statutory provisions relevant to this appeal were:—

Sale of Goods Decree (Laws of Zanzibar, 1934, c. 81)

"3.—(1) A contract for the sale of any goods entered into after the first day of October, 1921, of the value of one hundred rupees or upwards shall not be enforceable by suit in any court in the Protectorate unless the buyer shall accept part of the goods so sold, and actually receive the same, or pay not less than ten per cent. of the price thereof in part payment, or unless some note or memorandum in writing of the contract be made and signed by the party to be charged or his agent in that behalf."

Stamp Decree, 1940

"A. *of the liability of Instruments to Duty*

"4. Every instrument described in the First Schedule hereto shall, unless expressly exempted therefrom by this Decree,

" be chargeable with duty of the amount indicated in that " Schedule as the proper duty therefor—

* * * * *

" C. *Of the Time of Stamping Instruments*

" 19. All instruments chargeable with duty and executed by " any person in the Protectorate shall be stamped within thirty " days of execution:

" Provided that any instrument chargeable with duty of ten " cents, or twenty cents or promissory notes and bills of exchange " shall be stamped at or before the time of execution, or the " date of the instrument whichever shall be the earlier.

* * * * *

" *Instruments not Duly Stamped.*

* * * * *

" 39. No instrument chargeable with duty shall be admitted " in evidence for any purpose by any person having by law or " consent of parties authority to receive the evidence or shall be " acted upon, registered or authenticated by any such person or " by any public officer, unless such instrument is duly stamped:

" Provided that—

" (*a*) any such instrument not being an instrument " chargeable with duty of ten cents or twenty cents only " (other than a cheque) or a bill of exchange (other than a " bill of exchange presented for acceptance, accepted or payable elsewhere than in the Protectorate) or a promissory " note, shall, subject to all just exceptions, be admitted in " evidence on payment of the duty with which the same is " chargeable, or, in the case of an instrument insufficiently " stamped, of the amount required to make up such duty, " together with a penalty of twenty shillings, or, when ten " times the amount of the proper duty or deficient portion " thereof exceeds twenty shillings, of a sum equal to ten " times such duty or portion;

* * * * *

" *FIRST SCHEDULE*

" *Stamp Duty on Instruments*

" *Description of* " *Instrument*	" *Proper* " *Stamp Duty*

* * * * *

"5. AGREEMENT OR MEMORANDUM OF AN AGREEMENT—	
"(*a*) if relating to the sale of a bill of "exchange;	Twenty cents.
"(*b*) if relating to the sale of a Government security, or share in an "incorporated company or other "body corporate;	Twenty cents.
"(*c*) if not otherwise provided for	One shilling.
"*Exemptions*	
"(1) Agreement or memorandum of an "agreement—	
"(*a*) for or relating to the sale of goods "or merchandise exclusively, not "being a note or memorandum "chargeable under No. 41;	
* * * * *	
"41. NOTE OR MEMORANDUM, sent by a "broker or agent to his principal intimating "the purchase or sale on account of such "principal—	
"(*a*) of any goods of the amount or "value of forty shillings or over;	Twenty cents."

1955. February 23, 24, 28. [The argument is here reported only on the question whether the "local contract note" was stamped "at or before the time of execution" within the meaning of section 19 of the Stamp Decree, 1940.]

Frank Gahan Q.C. and *J. G. Le Quesne* for the appellants. By way of defence to the action the seller pleaded, inter alia, that the document was not admissible in evidence because it had not been stamped at the time of execution with a 20 cent stamp which the law required to be affixed at or before the time of execution. The document was signed by the broker on the evening of June 19, 1950, but was not stamped until after it had been delivered to and signed by the appellants on the following day. The contractual obligations evidenced by the document only arose when it was signed by the appellants, and even if it could be construed as a broker's intimation to his principal of the contract then made within the meaning of article 41 of the First Schedule to the Stamp Decree, 1940, it was duly stamped at execution—the signing by the appellants—within the meaning of section 19. The document described in article 41 cannot exist until there is a

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sending, and possibly until it reaches the principal, because there must be " sent " an intimation of the purchase. The word " at " in the expression " at or before the time of execution " must be given an elastic meaning so as to mean no more than substantially contemporaneous with the time at or before which the stamping has to be done. In *In re Tunnel Mining Co., Pool's* case,[1] in which a contract for the issue of shares as fully paid up was given to the allotee late in the day for the purpose of his getting it filed with the registrar of joint stock companies, together with a certificate of the shares, and the contract was filed on the following morning, it was held that " the contract was filed ' at " ' the time of ' the issue of the shares, and they were deemed " to be fully paid up." [Reference was also made to *Bhawanji Harbhum* v. *Devji Punja* [2]—a bill of exchange case.] The execution must at the earliest be at the signing of the document; so the case in the appellants' favour here is even stronger than a bill of exchange case.

Leonard Caplan Q.C. for the respondent. The document was not, in accordance with the Decree, stamped at or before the time of execution. As Nihill P. said in his judgment in the court below: " A broker's note is executed at the moment of signature " by the broker. The document is dated June 20, 1950, but it is " not in dispute that the broker prepared his note and signed it " on the evening before. Let it be accepted that it was stamped " by the buyers' clerk on the following day, this was too late to " satisfy the requirements of the proviso to section 19 of the " Stamp Decree." The Decree says that the stamp must be affixed " at or before the time of execution," and that itself involves two questions: (i) what is the execution of a broker's note? and (ii) what is the meaning of the word " at " in the phrase? The Decree, in section 2, says that " execution " is " signature " unless the context otherwise requires. It is submitted that there is no context in the schedule which requires any other meaning to be given to execution than " signed." *Bhawanji Harbhum's* case,[2] which is a decision on when a bill of exchange is formally complete—and that is when it is delivered—does not help very much in deciding when a broker's note is formally executed—by signature.

An instrument must bear a stamp if " sent," and it is submitted that the Decree contemplates two things: (i) stamping before sending, and (ii) stamping by the broker. If that is right, a construction of the word "at" which involves that the due stamping may be after the sending and by the recipient and not the broker, is not within the intention of the Decree. Further, whatever execution means, it must be something done by the broker, and, therefore, nothing which happens after the broker has parted with possession of the document can ever be properly said to be done "at" execution. And lastly, the wording of the Decree is "at" and not "within a short or reasonable time "after." *Pool's* case[3] is distinguishable on the facts, and secondly, it is not so strong as it at first sight appears. The same observations also apply to *In re Ambrose Lake Tin and Copper Co.*[4] The word "at" is put in to show that it has to be done before it leaves the hand of the broker, and by the person who executes it; it is too late after it has left his hand.

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[1] (1887) 35 Ch.D. 579.

[2] (1894) I.L.R. 19 B. 635.

April 19. The judgment of their Lordships was delivered by LORD SOMERVELL OF HARROW. This is an appeal from the Court of Appeal for Eastern Africa reversing a decision given by the High Court of Zanzibar. The plaintiffs and defendant are both Indian merchants carrying on business, inter alia, as clove dealers in Zanzibar. The plaintiffs sued for damages for failure to deliver 20,000 lb. of cloves under a contract alleged to be in writing. Before Gray C.J. the plaintiffs succeeded and were awarded 8,750s. with costs and interest. No question arises as to quantum of damage. The decision was reversed by the Court of Appeal and the plaintiffs appeal.

The contentions put forward by the respondent in answer to the claim are based on the following statutory provisions:—

[His Lordship stated the statutory provisions set out above and continued:] The respondent did not dispute that if the document was admissible it contained or evidenced a contract binding on him which he had broken, but he submitted (1) that the document was a broker's note or memorandum within article 41 of the First Schedule, (2) that it was not duly stamped and therefore could not be admitted in evidence for the purpose of the Sale of Goods' provision. The appellants admit that if both these propositions are established they cannot bring themselves within section 3 (1) of the Sale of Goods Decree and the claim must fail.

The appellants submit that it is not a broker's note within article 41 and the trial judge so held. They further submit that if it is, it was duly stamped. Further statutory provisions are relevant on the second point, but their Lordships will consider first whether the document was exempt from the necessity of being stamped under article 5 (1) (*a*) of the Schedule.

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[3] 35 Ch.D. 579.

[4] (1878) 8 Ch.D. 635, 640.

The original of the document was in Gujarati. The case below proceeded on the basis of an agreed translation which it is desirable to set out in full. [His Lordship stated the terms of the "Local contract note" set out above and continued:] Gray C.J. had compared the translation with the original and it appears from his judgment that the opening sentence, apart from the names of the parties, is printed; that the list of terms on the left is printed and what appears on the right opposite to these terms is in writing; that the note below the broker's signature and above the parties' signatures is printed. The broker was acting for the buyers and not for the seller.

Gray C.J., in a carefully reasoned judgment, referred first to the principle that the words of a taxing Act must clearly cover what is sought to be taxed. There was a previous decision binding on him in which a document similar in some respects had been held to be a "broker's note" within article 41 (*Vagani & Co.* v. *Lakhani Ld.*[1]). Gray C.J. distinguished that case and held that the present document did not intimate a purchase or sale, but was a draft of proposed terms to which the parties, by signing, could if so minded agree. If either party refused to sign there would be no contract and not a contract which was unenforceable because of the absence of a note or memorandum.

He relied on the words which appear just above the broker's signature: "the seller and the buyer have made bargain with signature." He construed these words not as referring to some other signed document but as anticipating the signatures at the foot, which would alone make the document a contract.

The Court of Appeal felt unable to distinguish the case from *Vagani's*[1] and dismissed the claim. In neither court does much reliance appear to have been placed on the important term which is introduced in the latter part of the note below the broker's signature. As a matter of construction this term is, in the opinion of the Board, outside anything that the broker has dealt with and has therefore to be accepted by the parties if there is to be a contract. In other words, this makes clearly right Gray C.J.'s conclusion that the document until signed was not an intimation by the broker of a purchase or sale. It is therefore outside article 41; and is exempt from stamping under article 5 (1). The respondent's contention fails and he was liable for his breach of contract.

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[1] (1949) 16 E.A.C.A. 5.

It is unnecessary to rely on or consider the admissibility of the surrounding circumstances which were given in evidence. The broker in fact personally took the document first to the seller, who was not his principal, and obtained his signature before taking it to the buyers. This is the course of events which would be anticipated on the construction of the document set out above.

It was sought to rely on evidence of custom, but this does not arise in the view which the Board take on construction.

The appellants submitted that apart from the " new term " and the words relied on by Gray C.J., the form of the document took it outside the words of article 41. Normally a broker's note is a bought or sold note reciting a sale or purchase according to the party to whom it is sent. It is not, as this is, bilateral in form. It is unnecessary to decide this point, but brokers might be well advised to reconsider a form of document which has given rise to the present litigation and to *Vagani's* case.[1] It is difficult to say anything useful about that case as the document construed is not set out in the report.

The second point does not therefore arise, but in view of one or two observations made below and the points taken before the Board, it is desirable to deal with it briefly.

The broker made out and signed the document on the evening of the 19th. He did not himself stamp it. It was not suggested that he was trying to defraud the Revenue. It is reasonable to suppose that he adopted the same view as that taken by Gray C.J. and the Board. The appellants, when it was handed to them on the 20th, signed it and then handed it to their clerk for stamping, the broker being still in the office. They seem to have taken the view that it was or might be a broker's note. The following provisions of the Stamp Decree are relied on:—

" STAMP DECREE

" Section 2.—In this Decree, unless the context requires—

* * * * *

" (10) ' duly stamped,' as applied to an instrument, means " that the instrument bears an adhesive or impressed stamp of " not less than the proper amount and that such stamp has been

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[1] 16 E.A.C.A. 5.

"affixed or used in accordance with the law for the time being "in force in the Protectorate;

"(11) 'executed' and 'execution' used with reference to "instruments, mean 'signed' and 'signature';

* * * * *

"(13) 'instrument' includes every document by which any "right or liability is or purports to be, created, transferred, "limited, extended, extinguished or recorded; . . ."

Reading these provisions with section 19 the argument runs as follows. This instrument being chargeable with duty of 20 cents had to be stamped at or before the time of execution. That means at or before the time of signature, namely, the evening of the 19th, whereas it was not stamped until the following day. Various submissions were made on the other side. A "note" is not within article 41 until sent, and a note is not sent until it leaves the sender. It did not in the present case leave the sender until the morning of the 20th just before it was stamped. The provision as to the meaning of execution is "unless the context "otherwise requires." The word "at" in the phrase "at or "before" in the proviso to section 19 cannot mean simultaneously with signing, and must therefore cover a reasonable time after signing. The Board was referred to *Pool's* case,[2] in which North J. construed the word "at" in the phrase "at or "before the issue of such shares" as covering what was done if done as substantially part of one and the same transaction. Other cases were referred to. In the courts below Gray C.J. regarded it as perfectly clear that if the document was a broker's note it was not properly stamped. The leading judgment by the President in the Court of Appeal says that the contrary was argued but faintheartedly. The matter has been clearly more fully argued before the Board and their Lordships have found the point a difficult one. It would be undesirable to decide it on a document which does not raise it, but should a similar point arise in the future, the arguments referred to, particularly, as to the scope of the preposition "at" in its context in section 19, will require careful consideration.

The Board will humbly advise Her Majesty that this appeal should be allowed, the judgment of the Court of Appeal for

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[2] (1887) 35 Ch.D. 579.

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Eastern Africa set aside with costs and the judgment of Gray C.J. restored. The respondent must pay the costs of this appeal.

Solicitors: *Bircham & Co.; Herbert Oppenheimer, Nathan & Vandyk.*

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In re COX, DECD.

EDWIN G. BAKER . . . . . . APPELLANT;

AND

NATIONAL TRUST CO. LD. AND OTHERS . . RESPONDENTS.

[AND CONNECTED APPEAL.]

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Charity—"Charitable purposes only, for"—Limited class of beneficiaries—Gift of income of residue to employees and ex-employees of company "in perpetuity for charitable purposes only"—Not a valid charitable bequest—Poverty, relief of—Class of beneficiaries. Canada.

A testator by his will directed his trustees to hold the residue of his estate upon trust "to pay the income thereof in perpetuity "for charitable purposes only; the persons to benefit directly in "pursuance of such charitable purposes are to be only such as shall "be or shall have been employees of The Canada Life Assurance "Company and/or the dependants of such employees . . .; subject "to the foregoing restrictions, the application of such income, "including the amounts to be expended and the persons to benefit "therefrom, shall be determined by the board of directors of the "said . . . company, as they . . . in their absolute discretion "shall from time to time decide . . .":—

Held, (1) that, notwithstanding the use of the words "in perpetuity" and "directly," there was no general charitable trust for "indirect" benefits; and that the only beneficiaries within the bequest were employees and ex-employees of the company and their dependants.

(2) That the bequest must be read as if after or instead of the words "for charitable purposes only" there was set out in full Lord Macnaghten's definition of charity in *Commissioners for Special Purposes of the Income Tax* v. *Pemsel* [1891] A.C. 531, 583; 7 T.L.R. 657, and so read the trustees were given a discretion

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* *Present*: Viscount Simonds L.C., Lord Oaksey, Lord Reid, Lord Tucker and Lord Somervell of Harrow.

to apply the income of the fund in perpetuity among those beneficiaries for any of the four purposes enumerated by Lord Macnaghten; it was not limited to such purposes as, having regard to the prescribed beneficiaries, could be regarded as charitable.

If it were open to doubt whether a gift in perpetuity for the relief of poverty confined to that class of beneficiaries was a valid charitable trust—as to which the Board expressed no opinion—a gift for their education was not (*Oppenheim* v. *Tobacco Securities Trust Co. Ld.* [1951] A.C. 297; [1951] 1 T.L.R. 118; [1951] 1 All E.R. 31), and accordingly the gift as a whole was not a good charitable gift.

Verge v. *Somerville* [1924] A.C. 496, 499; 40 T.L.R. 279 and *Gibson* v. *South American Stores* (*Gath & Chaves*) *Ld.* [1950] Ch. 177; 66 T.L.R. (Pt. 1) 83; [1949] 2 All E.R. 985 considered.

Judgment of the Supreme Court of Canada [1953] 1 S.C.R. 94 affirmed.

Consolidated appeals (No. 20 of 1953), by special leave, from two judgments of the Supreme Court of Canada (December 22, 1952) affirming by a majority (Kerwin, Taschereau, Kellock, Estey and Fauteux JJ., Rand and Cartwright JJ. dissenting), subject to a variation thereof, two judgments of the Court of Appeal for the Province of Ontario (Roach, Aylesworth and Bowlby JJ.A.) (February 16, 1951), which allowed unanimously appeals from two judgments of Wells J. of the Supreme Court of Ontario (January 27, 1950), whereby certain bequests respectively contained in the wills of Herbert Coplin Cox and Louise Bogart Cox, his widow, were declared to constitute valid charitable bequests for the relief of poverty.

The testator, who died on September 17, 1947, provided by his will, dated June 23, 1938, as follows: " Subject as hereinbefore provided, and with respect to the balance of my " residuary estate which may remain in my trustees' possession, " my said trustees shall hold the same upon trust as follows: " To pay the income thereof in perpetuity for charitable purposes " only; the persons to benefit directly in pursuance of such " charitable purposes are to be only such as shall be or shall have " been employees of The Canada Life Assurance Company and/or " the dependants of such employees of said The Canada Life " Assurance Company; subject to the foregoing restrictions, the " application of such income, including the amounts to be " expended and the persons to benefit therefrom, shall be determined by the board of directors of the said The Canada Life " Assurance Company as they, the said board of directors, in " their absolute discretion shall from time to time decide. The "trust fund is to be known as 'The Cox Foundation' in memory "of the family whose name has been so long associated with the "said company."

The widow, who died on November 18, 1948, in her will, dated November 2, 1948, made a similar provision.

By an originating notice of motion issued in the Supreme Court of Ontario in March, 1949, the administrators of the testator's will, the National Trust Co. Ld. and Alfred Herbert Cox, sought the determination of the court whether the bequest of his residuary estate (set out above) was a valid charitable bequest and further sought certain consequential directions. An originating motion seeking similar relief was taken out by the executors of the widow in March, 1949.

1954. Oct. 4, 5, 6, 7. *Geoffrey Cross Q.C.*, *Armand Racine Q.C.* (Canada) and *R. O. Wilberforce Q.C.* for the Public Trustee for Ontario, the appellant in the second appeal, on behalf of charitable interests generally. The question is whether the residuary dispositions in the wills of the testator and his wife, which are both in substantially identical terms, constitute valid charitable trusts or are void for perpetuity. When a bequest is made in terms, as here, "for charitable purposes only" the gift should not be held to fail, on the ground that it is not a charitable gift, unless there is the clearest indication that in fact it was intended to be applied for non-charitable purposes. Prima facie, there could not be more apt words to create a valid charitable trust than those used in the present will. The interpretation placed upon the bequests by Cartwright and Rand JJ. in their judgments in the Supreme Court was right, namely, that the gifts in this case were for general charitable purposes followed by directions as to the particular mode in which the application of the trust fund for charitable purposes was to be carried out, the direction as to employees of The Canada Life Assurance Company being a direction which related to direct benefits only and which did not relate to other types of benefits which could be conferred. The fact that the words are "in perpetuity" is against the view that the only beneficiaries are the employees. When the testator said "in perpetuity" he meant in perpetuity. And again, the word "directly" shows that a distinction has to be drawn between "direct" and "indirect" benefit. One must not think of the employees as the only possible beneficiaries. He starts off with a perpetual gift and puts on that a restriction in favour of the employees. Reading this clause as a whole, there is no justification for saying that the only possible beneficiaries are the employees of the company; assuming that this restriction is valid, it does not in any way defeat the primary gift for charitable purposes. It is a question of construction, and shades of language make a difference. The language of Lord Davey in *Hunter* v. *Attorney-General* [1] is prayed in aid and shows that the fact that there is a class does not necessarily preclude the valid charitable intention; the different considerations have to be balanced.

Even if it be held that the direction relating to employees of the company is invalid, effect ought to be given to the clearly expressed general charitable intention, either cy-près by means of a scheme or by permitting the trustees or the board of directors of the company to carry it into effect. In any event, the trusts should be considered to be charitable as being beneficial to the community since the employees and their dependants form a substantial section of the community and English decisions to the effect that a class defined by reference to common employment cannot form a section of the community for the purpose of a charitable trust (not being a trust for the relief of poverty) should not be regarded as forming part of the law of Ontario. Alternatively, in any event, having regard to the class of persons involved and to the nature of the application directed, the trusts should be considered as being for the relief of poverty as being the only one of the recognized heads of charitable purposes to which effect can be given and as such, following a line of English authority, as valid, whether or not they were for the public benefit or beneficial to the community, and notwithstanding that the designated beneficiaries were selected on the basis of employment by a particular company.

John J. Robinette Q.C. (Canada) and *Denys Buckley* for the appellant in the first appeal, Edwin G. Baker, representing the employees of the company. The interpretation of the wills submitted on behalf of the Public Trustee for Ontario is adopted generally—it is not said that the employees or the dependants of employees are the sole beneficiaries under the will—and the same distinction is made with reference to the word "directly" as was made for the Public Trustee. It is submitted that whether or not the employees are beneficiaries in any way, in either event the income from the fund must be applied for charitable purposes, and the trustees cannot use the fund or any part of it for a purpose which is not charitable according to legal concepts of charity.

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[1] [1899] A.C. 309, 324; 15 T.L.R. 384.

No part of the income of the fund could properly be applied for the benefit of the employees or dependants otherwise than in a charitable manner.

Spiller v. *Maude* [2] supports the general proposition that trusts for the relief of poverty have proceeded on their own lines, and that there is a distinction between trusts for the relief of poverty and trusts for religion and education. The relief of poverty amongst the employees and dependants is a charitable purpose and does not lack a sufficient element of public benefit to qualify as a charitable purpose. Here there is sufficient public interest to uphold it as a valid charitable trust; the employees should be considered a section of the public. The element of public benefit necessary to constitute a trust for the relief of poverty a charitable trust differs from that required in other classes of charitable trusts, such as, for instance, trusts for education. *Oppenheim* v. *Tobacco Securities Trust Co. Ld.*[3] is accepted. The distinction between trusts for the relief of poverty and other kinds of charitable trusts has been recognized and acted upon by British courts of equity over a very long period, and in this respect the law in Ontario ought not to, and does not, differ from the general law administered elsewhere in the British Commonwealth and Empire where the doctrines of equity derived from English law operate. There is a line of authorities which, it is submitted, supports the proposition that the application of moneys for the relief of poverty of employees of a company is a valid charitable purpose. *In re Gosling* [4] indicates that the relief of poverty is a good legal charitable purpose. It is implicit in the reasoning in *In re Drummond* [5] that if the trust had been for the relief of poverty among the employees, then for that purpose it would have been a sufficient section of the public to constitute a trust for the relief of poverty, and it would have been held to be a good charitable trust. *In re Rayner* [6] was discussed by Lord Greene M.R. in *In re Compton* [7] and it is permissible to say that *In re Rayner*,[6] in so far as it relates to the trust for relief of poverty, stands unimpeached. *Gibson* v. *South American Stores (Gath & Chaves) Ld.*,[8] which supports our conclusion, was confirmed by the Court of Appeal,[9] who said that they were bound by the previous unreported decision of *In re Sir Robert Laidlaw*.[10] The Court of Appeal later followed *Gibson's* case [11] in *In re Coulthurst, decd.*[12]

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[2] (1881) 32 Ch.D. 158n., 160.

[3] [1951] A.C. 297; [1951] 1 T.L.R. 118; [1951] 1 All E.R. 31.

[4] (1900) 48 W.R. 300; 16 T.L.R. 152.

[5] [1914] 2 Ch. 90; 30 T.L.R. 429.

[6] (1920) 122 L.T. 577.

[7] [1945] Ch. 123, 135, 137; 61 T.L.R. 167; [1945] 1 All E.R. 198.

[8] [1949] Ch. 572, 575; 65 T.L.R. 370.

[9] [1950] Ch. 177, 195; 66 T.L.R. (Pt. 1) 83; [1949] 2 All E.R. 985.

There is thus a very substantial series of cases on which, presumably, persons have acted, and it was wrong of the Canadian courts to decline to follow those decisions, which set a clear pattern; they are based on the same principle as the poor relations cases, though not of the same antiquity. As to when the House of Lords and the Privy Council should mark its disapproval of a long line of cases, see *Oppenheim's* case.[13] The Canadian courts were not justified in disregarding the entire trend of the decisions, which are all one way, that a trust for the relief of poverty of the present character is good. It is further submitted that the observations on the poor relations cases in *Oppenheim's* case [13] are equally applicable to the descendants of those cases, the poor employees cases. A similar view was put in *Gilmour* v. *Coats*,[14] which recognizes that there may be a different base for poverty than there is for education or the advancement of religion. It matters not whether it is relief of poverty of members of a family or of employees of a company or of members of a society, the logical distinction is the element of poverty running through the cases; it is the distinguishing factor: *In re Compton*.[15] The matter is further developed in *In re Hobourn Aero Components Ld.'s Air Raid Distress Fund*,[16] and nowhere does Lord Greene suggest that the line of cases—the poor relations and poor employees cases—was wrongly decided. The two types of cases are in reality one. Jenkins L.J. took the same view in *In re Scarisbrick*.[17] The whole trend of authority recognizes a trust for the relief of poverty.

Further, one can discern some basis for the distinction on the ground of logic. The relief of poverty to named individuals necessarily involves a benefit to the public, for if they are not relieved from their poverty they are apt to become a charge on the community at large, and the benefit to the public is certain and definite. One gets back in all these cases to the Statute of Elizabeth; there is a real emphasis in the preamble on what is properly regarded as charitable—relief for aged, impotent and poor people. There is a real justification for treating poverty in

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[10] Unreported.

[11] [1950] Ch. 177.

[12] [1951] Ch. 661; [1951] 1 T.L.R. 651; [1951] 1 All E.R. 774.

[13] [1951] A.C. 297, 308.

[14] [1949] A.C. 426, 448; 65 T.L.R. 234; [1949] 1 All E.R. 848.

[15] [1945] Ch. 123, 137.

[16] [1946] 1 Ch. 194; 62 T.L.R. 313; [1946] 1 All E.R. 501.

[17] [1951] Ch. 622, 649; [1951] 1 T.L.R. 989; [1951] 1 All E.R. 822.

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a separate category. If that be wrong, and if in fact one should look at this in some broad way and try to calculate the major public benefit, it is submitted that the figure of 30,000 potential beneficiaries equally satisfies that test.

Denys Buckley following. On the question of construction it is fully accepted that the language must be construed without reference to the result, and then what the result is must be discovered. The testator has stated generally what his intention is, and then restricted that general intention—the directors cannot apply in any way which is not charitable; they cannot give a direct benefit to any individual unless he is an employee. Those are the restrictions on the trust which otherwise confers on the directors an absolutely wide discretion. "Directly" must have been intended to mean something, and it is sought to construe it as referring to employees selected as such to receive a benefit. If one cannot find any employees who can be benefited in pursuance of a charitable purpose then that restriction becomes redundant, but that does not invalidate the trust as a whole.

On the question whether or not a trust for the relief of poverty must be a trust extending to parts of the public, over a long period those cases have always been treated by the courts in a somewhat different way from other charitable trusts. *Bristow* v. *Bristow*,[18] while not of much assistance here, was a poverty case in which the persons to be benefited must have been numerically very small. The question must always be, on what basis are these poverty cases to be treated as charity at all? The courts have regarded relief of poverty as involving a sufficient element of charity; that is the only ground on which these cases can be made to fit into the general theory of the law of charity. Relief of poverty has from New Testament times almost been regarded as the prototype of charity. The law of charity emerges out of the mists of law, and it is reasonable to suggest that from the earliest times the relief of poverty was a religious and social duty, and it is put in the very forefront of the Statute of Elizabeth. [Reference was made to *Spiller* v. *Maude*,[19] *In re Gosling*,[20] *In re Donald*,[21] *In re Drummond*,[22] *In re Rayner*,[23] *In re Sir Robert Laidlaw*,[24] which is referred to in *Gibson's* case,[25] and to *Gibson's* case in the Court of Appeal.[26]]

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[18] (1842) 5 Beav. 289, 292.
[19] 32 Ch.D. 158n.
[20] 48 W.R. 300.
[21] [1909] 2 Ch. 410.
[22] [1914] 2 Ch. 90.
[23] 122 L.T. 577.
[24] Unreported.
[25] [1950] Ch. 190.
[26] [1950] Ch. 177.

There is thus a series of decisions, extending over 70 years, all of which have decided that trusts for the relief of poverty in a restricted class of one kind or another are valid charitable trusts. They must be treated as following the same line as the poor relations cases: there is no ground on which they can be distinguished; and Jenkins L.J. in *In re Scarisbrick*[27] treated all those cases—poor relations and relief of poverty—all together as being an exception to the general rule. It is suggested that it is not really an exception to the general rule, but a class of cases in which the court finds the general rule fulfilled in a different way. It is not possible in this case to say that the law in England on this subject has developed in recent times in a way which would justify the court saying that English decisions should not be adopted in Canada. *Ommanney* v. *Butcher*[28] shows the distinction that was drawn between private charities and charities recognized by the court which were public in their nature. In the case of poverty trusts, notwithstanding that persons whose poverty is to be relieved are members of a class, a public interest arises because the relief of poverty itself is in the interest of the public. The statement of Lord Cairns in *Goodman* v. *Mayor of Saltash*,[29] which is quoted in *In re Christchurch Enclosure Act*,[30] is precisely in point here. All the poor relations and relief of poverty cases can be justified on principle and they should be regarded as good law.

Milner Holland Q.C., *J. D. Arnup Q.C.* (Canada) and *T. A. C. Burgess* for next-of-kin and for the Official Guardian for Ontario (P. D. Wilson, who was also present in person). On construction, fairly read, this is a gift intended for the benefit only of the employees of the company and their dependants.

[He was not required to argue on the meaning of "direct" and "in perpetuity."]

The charitable purpose intended by the testator was not in terms confined to any one or more of the four classes of charitable purposes known to the law and the directors could therefore apply the fund to any of such four purposes. There is nothing in the relevant clause which limits the purposes for which the trust fund is to be applied to the relief of poverty. They are perfectly appropriate to money being spent on the education of children. The testator had in mind a number of possible charitable purposes. He could have said, "to such charitable purposes which, if given

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[27] [1951] Ch. 622.

[28] (1823) Tur. & R. 260, 273.

[29] (1881) 7 App.Cas. 633.

[30] (1888) 38 Ch.D. 520, 530; 4 T.L.R. 392.

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"to the class specified, would be charitable purposes in the eye "of the law," but he has not said that.

The next question, and assuming that the trust is construed exclusively for the relief of poverty among this class, is whether any trust for the relief of poverty supplies its own element of public interest in that all relief of poverty is in the public interest. Until this case every judicial pronouncement on the subject has said that the poor relations cases do not contain an element of public interest. It is submitted as a first principle that no purpose is a charitable purpose unless it is of a public character. Tudor on Charities, 5th ed., pp. 11–13, states the general proposition, and see the cases there cited. Another important statement of that proposition is to be found in *Commissioners for Special Purposes of the Income Tax* v. *Pemsel*[31]; and perhaps the locus classicus is the speech of Lord Wrenbury in *Verge* v. *Somerville.*[32] *Isaac* v. *Defriez*[33] and *Attorney-General* v. *Price*[34] are unsatisfactory cases in support of the proposition that the relief of poverty is itself a public object. [Reference was also made to *Attorney-General* v. *Duke of Northumberland.*[35]]

In all other contexts, with certain exceptions, employees of a company have been held to be not a section of the public. In the poor relations cases there has not been any consideration of the public character of the trusts concerned. With regard to the cases relating to the relief of poverty among small classes, see *Spiller* v. *Maude*,[36] in which the public element was not considered at all; *Bristow* v. *Bristow*[37]; *In re Gosling*,[38] where the question whether the old and worn out clerks were a section of the public was argued and decided; *In re Donald*[39]; *In re Drummond*[40]; *In re Rayner*[41]; *In re Sir Robert Laidlaw*[42]; *Gibson's* case[43] and *In re Coulthurst, decd.*[44] So, of the reported cases in only one, *In re Gosling*,[45] was the necessity for public element argued. On that review of the cases this Board should not disturb the very numerous general pronouncements in favour of the necessity of public interest in all charitable gifts. Secondly, the Board should be reluctant to alter what has been said again

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[31] [1891] A.C. 531, 580; 7 T.L.R. 657.

[32] [1924] A.C. 496, 499; 40 T.L.R. 279.

[33] (1754) 2 Amb. 595.

[34] (1810) 17 Ves. 371.

[35] (1877) 7 Ch.D. 745, 748–50.

[36] 32 Ch.D. 158n., 160.

[37] 5 Beav. 289.

[38] 48 W.R. 300.

[39] [1909] 2 Ch. 410.

[40] [1914] 2 Ch. 90.

[41] 122 L.T. 577.

[42] Unreported.

[43] [1950] Ch. 177, 193–5.

[44] [1951] Ch. 193.

[45] 48 W.R. 300.

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and again with a great deal of authority, that in fact the poor relations cases are anomalous. Thirdly, and this is stressed, it does not seem sensible that a private trust for the relief of one poor person should be designated a charitable trust in the eye of the law; it is not consistent with the general tenor of the law of charitable trusts.

Arnup Q.C. following. The recent English cases of *Gibson,*[46] *Coulthurst*[47] and *Oppenheim*[48] had not been decided when this case was begun in Canada, and it was there largely a matter of first impression. The Court of Appeal for Ontario in this case declined to introduce a second exception into this branch of the law: they said: " . . . the trusts here in question can be valid " charitable trusts only if there is a second exception to the " general rule, namely, trusts for the relief of poverty among a " group of private individuals who are chosen by the donor by " reason of another type of personal relationship, namely, their " relationship as employees or dependants of employees of a " named employer. In my opinion this court should hold that " in this Province there is not such an exception to the general " rule." They said in clear terms that there must be public benefit in all cases, and it is submitted that that is the appropriate and correct approach. [Reference was made to *Williams' Trustees* v. *Inland Revenue Commissioners.*[49]]

On construction, it is difficult to assume that the testators had in mind any poverty stricken employees of the company. If that be so; if there was no dedication by the testators to the relief of poverty, then the *Gibson* case[50] does not arise at all for consideration in this case.

Denys Buckley for the National Trust Co. Ld. and the board of directors of The Canada Life Assurance Co., respondents in both appeals, adopted the case of the appellant Edwin G. Baker.

1955. May 19. The judgment of their Lordships was delivered by Lord Somervell of Harrow. This is an appeal, by special leave, from a decision of the Supreme Court of Canada dismissing (by a majority) an appeal from the Court of Appeal of Ontario which allowed an appeal from Wells J. The question is whether there was by the will of the late Herbert Coplin Cox a valid charitable bequest of the residue of his estate which he directed his trustees to hold upon trust as follows: [His Lordship stated the terms of the relevant clause as set out above, and continued:] An originating summons was taken out by the National Trust Co. Ld. and Mr. Cox as administrators and trustees of the will. Edwin G. Baker is president of the Canada Life Assurance Co. and represents the interests of the employees and ex-employees. The other parties are the next-of-kin and the Public Trustee for Ontario, who represents the interests of charities generally.

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[46] [1950] Ch. 177.
[47] [1951] Ch. 193.
[48] [1951] A.C. 297
[49] [1947] A.C. 447, 459; 63 T.L.R 352; [1947] 1 All E.R. 513.
[50] [1950] Ch. 177.

There is a similar provision in the will of Mr. Cox's widow.

It must first be determined what is the true construction of this bequest. In the event of a certain determination a question of much difficulty arises, whether a gift in perpetuity for the relief of poverty confined to employees of a particular employer and their dependants is a good charitable trust. In the view which their Lordships take that question does not fall for decision. To explain how the question arises and the issues raised on construction it is necessary first to recall Lord Macnaghten's definition of charity in *Commissioners for Special Purposes of the Income Tax* v. *Pemsel* [1]: " 'Charity ' in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads."

Secondly, there should be borne in mind the familiar proposition that in order to qualify as a charity a gift must, to use the words of Lord Wrenbury in *Verge* v. *Somerville*,[2] be "for the benefit of the community or of an appreciably important class of the community." In connexion with this general proposition it is to be remembered that a gift for the education of a group of employees of a particular employer is not a charity (*Oppenheim* v. *Tobacco Securities Trust Co. Ld.*[3]). There is ancient authority for supporting a gift for the relief of poor relations, and the Court of Appeal has recently held good a gift to relieve the poverty of employees of a particular employer (*Gibson* v. *South American Stores* (*Gath & Chaves*) *Ld.*[4]). The correctness of this decision was expressly reserved in *Oppenheim's* case.[3]

The first question of construction arises upon a submission made by counsel on behalf of the Public Trustee for the Province of Ontario. It was argued that there was a general charitable trust for "indirect" benefits which was not restricted to the class who were to receive "direct" benefits. On this view a cy-près scheme should be established. This construction was based mainly on the words "in perpetuity" and "directly" in the bequest. It commended itself to a minority in the Supreme Court, but their Lordships cannot accept it. The words "in perpetuity" mark the distinction between charitable and ordinary trusts. The word "directly" is not inapt though it may be surplusage. The employees are to be his direct beneficiaries and it will be immaterial that others might benefit indirectly. It would need very plain words to restrict a trust to "indirect" benefits, nor is it clear what the words would mean. Their Lordships are satisfied that the only beneficiaries within the bequest are the employees and ex-employees of the company and their dependants.

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[1] [1891] A.C. 531, 583.

[2] [1924] A.C. 496, 499.

[3] [1951] A.C. 297.

[4] [1950] Ch. 177.

The second question turns upon the meaning in their context of the words "for charitable purposes only." It appears to their Lordships that these words look back to the preamble of the Statute of Elizabeth and the exposition of its scope and meaning which has been familiar to generations of lawyers by the passage cited from Lord Macnaghten's judgment. The relevant bequest must, then, be read as if Lord Macnaghten's classification was set out in full after or instead of the words "for charitable purposes only." If it is so read it follows that the trustees are given a discretion to apply the income of the fund in perpetuity for the benefit of the employees in question for any of the purposes enumerated in Lord Macnaghten's classification, and if this is so, it is not in doubt that the gift as a whole is not a good charitable gift. If it is open to doubt whether a gift in relief of poverty of such a group is valid it is clear that a gift for their education is not. This construction was put forward on behalf of the next-of-kin.

The alternative construction, which is submitted on behalf of the employees, involves, as it appears to their Lordships, the introduction of words after the words "for charitable purposes "only," which are designed not to explain those words but to avert the invalidity which ensues from reading them in their natural sense. The court is in effect asked to read the phrase as if the testator had directed his trustees to apply the income not for all or any of the purposes which the law recognises as charitable but only for such (if any) of those purposes as, having regard to the prescribed beneficiaries, could be regarded as charitable.

While that is not perhaps an impossible construction, the circumstances of this case are such that their Lordships cannot adopt it. The construction requires that the testator must be supposed to have had some doubt whether all the purposes or divisions set out by Lord Macnaghten could be held to be charitable purposes with regard to the class of persons whom he intended to benefit. The only reasonable doubt would have been whether, if the other purposes were invalid, the purpose of relieving poverty among these beneficiaries would be held valid. But the testator cannot have supposed that persons in the employment of the company would be in poverty save in the most exceptional circumstances, nor can he have supposed that former servants of the company would often require financial assistance for this reason. Yet the sum which he directed to be held for charitable purposes is large, and it appears to their Lordships to be impossible in the circumstances to hold that he intended it to be held solely for the purpose of relieving poverty among his beneficiaries if it should prove that no other purpose could be sustained as valid.

Although Wells J. found a good charitable trust for the relief of poverty it seems clear that he accepted the construction which commends itself to their Lordships. He said: "I think "there can be no question that the gift must be deemed to be "for any of the four purposes which the authorities have laid "down, as compendiously describing charitable trusts," an opinion on the question of construction which he forcibly reiterated later in his judgment. In spite of this he felt able to declare a valid trust limited to the relief of poverty only. This, with respect, is wrong, as has been stated above. On the construction adopted by Wells J. the whole trust must fail.

The Court of Appeal refused to follow or apply *Gibson's* case [5] and the trust was therefore invalid on either construction. It is, however, clear that the court took the same view as that taken by Wells J. Roach J.A., in whose judgment the other members of the court concurred, said: "The trusts with which "we are concerned are 'for charitable purposes only'. That "phrase necessarily includes all legal charities."

In the Supreme Court the minority as well as the majority construed the bequest in the same way. Kellock J. (with whom Taschereau and Fauteux JJ. concurred) said [6]: "I see no escape "from reading the words used as though the testator had set "out seriatim the said four heads"—that is Lord Macnaghten's

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[5] [1950] 1 Ch. 177.

[6] [1953] 1 S.C.R. 103.

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classification. Estey J. said[7]: "It would appear that the "testator, in providing that the directors might expend the "income for charitable purposes, included the relief of poverty, "in the same sense that all other purposes and objects are "included, and made it abundantly clear that the employees "and their dependants should benefit, not only in case of "financial need, but in any manner that might be included "within the phrase 'charitable purposes'." Cartwright J., who was in the minority, referred to the words in question as words[8] "which in their ordinary and natural meaning in no way "restrict the application of the income to the relief of poverty."

Finding this consensus of opinion upon the question of construction their Lordships would in any case be reluctant to take a different view, but it appears to them that the language of the will is unambiguous and that the construction placed upon them by the courts in Canada gives plain words their proper meaning. Their Lordships will therefore humbly advise Her Majesty that the appeals be dismissed. The costs of all parties of these appeals will be paid as between solicitor and client out of the estates of Herbert Coplin Cox and Louise Bogart Cox, and the former estate will bear three-quarters of such costs and the latter estate one-quarter of such costs.

Solicitors: *Slaughter & May; Lawrence Jones & Co.; Charles Russell & Co.*

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[7] [1953] 1 S.C.R. 103, 113.

[8] Ibid. 123.

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June 7.

NANA ATTA KARIKARI and Another . . Appellants;

and

NANA OWARE AGYEKUM II . . . . Respondent.

ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL.

West Africa—Appeal to Privy Council—Competency—Petition for dismissal—Appeal on costs only—Incompetent—"Matter in dispute"—Special leave—West African (Appeal to Privy Council) Order in Council, 1949–50, *art.* 3 (*a*) (*b*).
Privy Council—Appeal—Competency—Costs.

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* *Present*: Lord Radcliffe, Lord Somervell of Harrow and Mr. L. M. D. de Silva.

By article 3 of the West African (Appeal to Privy Council) Order in Council, 1949–50: "Subject to the provisions of this "Order, an appeal shall lie: (*a*) as of right, from any final judg- "ment of the court, where the matter in dispute on the appeal "amounts to or is of the value of £500 sterling or upwards, . . .; "and (*b*) at the discretion of the court, from any other judgment "of the court, . . . if, in the opinion of the court, the question "involved in the appeal is one which, by reason of its great "general or public importance or otherwise, ought to be submitted "to Her Majesty in Council for decision."

Having regard to the general position of appeals for costs only —that they will be entertained by the Board only in very exceptional circumstances—the words "matter in dispute" in article 3 (*a*) of the Order in Council must be construed as meaning matter in dispute in the proceedings other than costs. The article cannot be construed as conferring an appeal as of right where prima facie no appeal would be entertained whatever the amount in issue.

Accordingly, where the matter in issue on an appeal to the Board was as to costs only—a sum of £736 allowed by the West African Court of Appeal in respect of the preparation of a plan in proceedings relating to possession of land—the appeal was not within article 3 (*a*) and was dismissed as incompetent.

Inglis v. *Mansfield* (1835) 3 Cl. & Fin. 362; *Credit Foncier of Mauritius* v. *Paturau* (1876) 35 L.T. 869; *Donald Campbell & Co.* v. *Pollak* [1927] A.C. 732; and *Sauvageau* v. *Gauthier* (1874) L.R. 5 P.C. 494 considered.

While in theory at any rate appeals as to the incidence and quantum of costs might come within the provisions of paragraph (*b*) of article 3 of the Order in Council, or be the subject of special leave by the Board, there were no facts in the present case which justified the granting of special leave.

PETITION for dismissal of appeal.

This was a petition, by the respondent to this appeal, seeking to have the appeal struck out on the ground that the leave to appeal to Her Majesty in Council which the West African Court of Appeal had purported to grant to the appellants pursuant to article 3 (*a*) of the West African (Appeal to Privy Council) Order in Council, 1949–50, was incompetent.

By article 3 of the Order in Council: "3. Subject to the pro- "visions of this Order, an appeal shall lie:—(*a*) as of right, from "any final judgment of the court, where the matter in dispute "on the appeal amounts to or is of the value of £500 sterling or "upwards, or where the appeal involves directly or indirectly "some claim or question to or respecting property or some civil "right amounting to or of the said value or upwards; and "(*b*) at the discretion of the court, from any other judgment of "the court, whether final or interlocutory, if, in the opinion of "the court, the question involved in the appeal is one which, by "reason of its great general or public importance or otherwise, "ought to be submitted to Her Majesty in Council for decision."

The petitioner, as plaintiff, had in 1950 instituted proceedings for trespass upon and recovery of possession of certain lands. On March 3, 1951, by an order made in those proceedings by the Supreme Court the plaintiff was directed to prepare a plan of the area in dispute. On June 14, 1952, the Supreme Court (Dennison J.) gave judgment for the plaintiff against the defendants, whose appeal from that judgment to the West African Court of Appeal was dismissed on March 31, 1953.

Meanwhile, the taxation of the petitioner's bill of costs, which claimed in respect of the preparation of the plan a total of £869 12s., had been proceeding before the registrar of the Supreme Court. The taxing officer took the view that the order for survey specifically limited the survey to a much smaller area than that actually surveyed, and he reduced the sum claimed to £9. Upon review, the judge held that the taxing officer had not used his wide discretion improperly and he refused to interfere.

The petitioner appealed from that decision to the West African Court of Appeal (Foster-Sutton P., Coussey J.A. and Windsor-Aubrey J.) who, on February 14, 1954, allowed the appeal and allowed £736 12s. in respect of the costs of preparing the plan.

Leave to appeal from that judgment was sought by the appellants to this appeal under article 3 (*a*) of the Order in Council, and was granted on March 15, 1954.

By this petition the respondent to the appeal submitted that the leave to appeal was incompetent since: (a) the decision of the West African Court of Appeal was not a final judgment of the court of the character specified in article 3 (*a*) of the Order in Council; (b) an appeal does not lie for costs alone, as was decided in *Inglis* v. *Mansfield* [1]; (c) no error of law was alleged and, in fact, no principle of law was involved; and (d) the court did not purport to act under article 3 (*b*), but the question involved in the appeal was not of a character specified in article 3 (*b*), and was of a character which Her Majesty in Council would not entertain.

1955. May 2, 3. *Phineas Quass Q.C.* and *K. Narayan* for the petitioner. The appeal is purely as to costs only, and where there is no question of principle or point of law involved this

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[1] (1835) 3 Cl. & Fin. 362, 371.

Board will not entertain such an appeal. As stated in Bentwich, Privy Council Practice, 3rd ed., p. 114, " the proper course, when " an irregularity has happened which may be fatal to the appeal, " is for the respondent to apply by petition as early as possible, " and before the cases are lodged and the expense of preparing " them is incurred, in order to bring the point before the Judicial " Committee and to get the appeal dismissed. It is then open " to their Lordships either to recommend Her Majesty to dismiss " the appeal . . . or to grant special leave to appeal," and *Sauvageau* v. *Gauthier* [2] and *Pisani* v. *Attorney-General for Gibraltar* [3] are cited in support of that view. And in Safford and Wheeler's Privy Council Practice, p. 832, it is put thus: " Where an appeal " is informal and not competent, and ought not to be discussed " on the merits, it is the duty of the respondent to apply to quash " the appeal on that ground, whether allowed specially by the " Privy Council or granted as of course by the court below." There does not appear to be a single case where the Board has determined an appeal as to costs if that is the sole point. No point was made in the courts below that the appeal was not competent. If the Board should take the view that the respondent should have asked for the leave to appeal to be rescinded, and not for the appeal not to be heard, leave is asked for now to amend the petition accordingly: it is only a matter of machinery [*Macfarlane* v. *Leclaire* [4] was referred to.] Once the appeal is here, however, it is submitted that the respondent has adopted the right course in seeking to have it dismissed. The material provisions in Mauritius are in all essentials identical with those in West Africa, and in *Credit Foncier of Mauritius* v. *Paturau* [5] it was held that " appeals to the Judicial Committee merely for " the sake of costs will not be allowed, even if the costs amount " to the appealable value "; that case is referred to in Bentwich, at p. 109, where it is also said that " the costs of a suit are not " part of the subject-matter in dispute." [Reference was also made to *In re Jerome* [6] and *In re Watson, Ex parte Phillips*.[7]] Reliance is placed on *Inglis* v. *Mansfield*,[8] where it was said in terms that " the rule with respect of costs in this House as well " as in the Privy Council and the Court of Chancery is that " you cannot appeal for costs alone." The same rule has been applied in various jurisdictions: *Mussumat Keemee-Baee* v.

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[2] (1874) L.R. 5 P.C. 494, 499.

[3] Ibid. 516, 525.

[4] (1862) 15 Moo.P.C. 181, 188.

[5] (1876) 35 L.T. 869.

[6] [1907] 2 Ch. 145.

[7] (1887) 19 Q.B.D. 234; 3 T.L.R. 668.

[8] 3 Cl. & Fin. 362, 371.

Latchman-Das Narrain-Das[9]; *Attenborough* v. *Kemp*,[10] which has often been cited and is again authority for the proposition that the Board will not consider a case of costs only in the absence of a question of principle or of law. See, also, *Richards* v. *Birley*,[11] *Wilson* v. *The Queen*[12] and *Yeo* v. *Tatem, The "Orient."*[13] On the authorities it would appear that this application should be made now and not when the appeal itself comes on: *Doss* v. *Doss*.[14]

As part of this argument the judgment of the West African Court of Appeal is adopted where they said that the survey of the whole area was necessary and that a survey of the leased area would have been of no assistance in deciding the issue of title, and further that the terms of the order for survey were wide enough to entitle the petitioner to survey not only the leased area, the site of the trespass, but the larger area.

Lastly, reference may be made to the Practice Note[15] where the questions to be decided on an appeal were whether in taking the accounts on the winding up of a partnership certain items should or should not be allowed on one side or the other, and Lord Romer, delivering the judgment of the Board, said: "They "are purely questions of fact. It is not, and cannot be, suggested "that they involve any question of principle whatsoever. Such "being the case, they most emphatically are not questions that "ought to be made the subject of an appeal to His Majesty in "Council." And that practice was adopted by the Board in the succeeding case of *N. R. Kapur* v. *Murli Dhar Kapur*.[16]

S. P. Khambatta Q.C. and *L. S. Fletcher* for the respondents to the petition. When the matter came before the West African Court of Appeal they held that leave to appeal should be given as of right. This is not an appeal as to a particular item of costs. This is a final order as to costs taxed by the taxing master; it is not as though there is any other issue as to costs left open between the parties which may at any time come up. The only matter in issue with which the plaintiff (petitioner) was dissatisfied was the decision relating to the two items of costs totalling £870. That is the issue between the parties and it has been determined by the order of the Court of Appeal, from which leave was sought to this Board and was granted as a final order. For that there is clearly authority: *Ramchand Manjimal* v. *Goverd-*

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[9] (1837) 1 Moo.I.A. 470, 479.
[10] (1861) 14 Moo.P.C. 351, 353.
[11] (1864) 2 Moo.N.S. 96, 98.
[12] (1866) L.R. 1 P.C. 405, 408.
[13] (1871) L.R. 3 P.C. 696, 702.
[14] (1869) 12 Suth.W.R.(P.C.) 29
[15] (1942) L.R. 69 I.A. 172.
[16] (1944) L.R. 71 I.A. 149.

handas Vishindas Ratanchand[17]; *Rai Radha Kishen* v. *Collector of Jaunpore*[18]; *Syed Muzhar Husein* v. *Bodha Bibi*[19]; *Rahimbhoy Hibibhoy* v. *Turner*.[20] Those decisions help on the finality of the judgment, order or sentence within the Order in Council. Applying the tests in those authorities to the present case, article 3 of the Order in Council is a statutory provision giving leave to appeal as of right from any final judgment of the court, and read with article 2 (1) it means any final decree, order, sentence or decision, and whatever be this of the Court of Appeal, be it decree, order, sentence or decision, it is submitted that it is a final judgment of the Court of Appeal within article 3 (*a*), and as it satisfies the appealable amount of £500 the question whether the Board will entertain the appeal according to the established practice—that question as it would be relevant to the issue of competency—does not arise within article 3 (*a*). The judgment of the Court of Appeal setting aside the judgment of Dennison J. and deciding that the sum should be £736 odd is a final decision of the Court of Appeal.

There are two aspects: (i) is the appeal competent; and (ii) is it one which the Board will take into consideration? Once the statutory requirement is satisfied the appeal becomes competent; and if it is a question whether the Board will entertain it or not, that point will only arise on the hearing of the appeal. In all the cases referred to in Bentwich, at p. 109, the question of competency was not touched upon. It was held in *Donald Campbell & Co.* v. *Pollak*[21] that notwithstanding the general rule of practice that no appeal lies for costs only, " the " House will entertain an appeal from an order of the Court of " Appeal as to costs, where it is alleged that the order is founded " upon an error of law." There is here a principle involved quite other than whether these are costs merely consequential on the decree. Dennison J. said in this case that there was good cause for the taxing master to make the order he did and that he (the judge) could not interfere. The Court of Appeal said that there was no good cause and that the taxing master had no jurisdiction to make his order. There is a question of law for consideration whether the interpretation of the Court of Appeal may not be erroneous; there is here a principle of law governing costs which may or may not be erroneous; it is a matter to be decided. It is submitted that Dennison J. took the right view and the Court of Appeal the wrong one.

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[17] (1920) L.R. 47 I.A. 124.

[18] (1900) L.R. 28 I.A. 28, 33.

[19] (1894) L.R. 22 I.A. 1.

[20] (1890) L.R. 18 I.A. 6.

[21] [1927] A.C. 732; 43 T.L.R. 787.

Quass Q.C. replied.

June 7. The judgment of their Lordships was delivered by LORD SOMERVELL OF HARROW. This is a petition to dismiss this appeal on the ground that the leave granted by the West African Court of Appeal pursuant to article 3 (*a*) of the West African (Appeal to Privy Council) Order in Council, 1949–50, was incompetent.

[His Lordship stated the terms of article 3 and continued:] The petitioner as plaintiff in 1950 instituted proceedings for trespass and recovery of possession of certain lands. The plaintiff succeeded. The defendants appealed and the appeal was dismissed. The present question arises on taxation of costs. The petitioner submitted his bill of costs for taxation. Under the Gold Coast Courts Ordinance, s. 13, and Order 7 of the First Schedule, the registrar acts as taxing master subject to review by the court. The West African Court of Appeal Ordinance, s. 3, provides that an appeal to the Court of Appeal as to costs only shall not lie except by special leave.

The phrase " as to costs only " normally refers to the incidence of costs, but it would seem to cover disputes as to quantum on taxation unless there is some special provision dealing with the latter.

This petition is concerned with two items of costs for a surveyor's fees and labourers' wages, amounting in all to some £870, incurred in the preparation of a plan. There had been an order by consent for the preparation of a plan and the taxing officer took the view that having regard to the terms of that order a much smaller and less expensive plan was all for which the petitioner could claim. He reduced this sum to £9. The judge upon review held that the taxing officer's discretion had not been exercised improperly and he refused to interfere. The petitioner appealed to the Court of Appeal, who allowed some £736 in respect of the two items of costs.

It was from this order that leave to appeal to the Privy Council was granted as of right under paragraph 3 (*a*) of the Order in Council. The first question is whether an appeal is within that paragraph when the matter in dispute is as to costs only.

This is an appeal as to quantum on taxation. If, however, such an appeal is within the paragraph it would seem impossible to contend that an appeal as to liability for the whole costs would not also be within it.

Appeals as to costs are in a special category. In 1835 Lord Brougham, in *Inglis* v. *Mansfield*,[1] said: " The rule with respect " to costs in this House, as well as in the Privy Council and the " Court of Chancery, is, that you cannot appeal for costs alone;". In *Credit Foncier of Mauritius* v. *Paturau and Others*[2] Sir Barnes Peacock said: " But appeals are not allowed to Her Majesty in " Council merely for the sake of costs." These statements require qualification. In a judgment of the Board delivered by Turner L.J. in an appeal from the Court of Arches (*Attenborough* v. *Kemp*[3]) it is said that an appeal might lie if the discretion had not been fairly exercised or there had been mistake. In *Donald Campbell & Co.* v. *Pollak*[4] the House of Lords decided that notwithstanding the general rule of practice of the House of Lords that no appeal lies for costs only, an appeal would be entertained if an error of law was alleged.

It is, however, sufficient for the question of construction that such appeals would only be entertained in very exceptional circumstances. It has long been held that costs cannot be added to the sum in dispute in the proceedings in order to make up the minimum sum in such a provision as is contained in article 3 (*a*). This is because costs, although in dispute and finally dealt with in the judgment, are outside the scope of the rule. The article is one conferring an appeal as of right based on quantum. It cannot, in their Lordships' opinion, be construed as conferring such a right in cases where prima facie no appeal would be entertained whatever the amount in issue. Having regard to the general position of appeals on costs as stated above it is natural to construe the words " matter in dispute " as meaning matter in dispute in the proceedings other than costs.

Their Lordships are therefore of opinion that the West African Court of Appeal were wrong in treating the application as one falling under article 3 (*a*).

The procedure adopted by the petitioners is that stated to be correct in *Sauvageau* v. *Gauthier*.[5] In that case the question was also whether the appeal was within the words of a provision similar to article 3 (*a*). The appeal came on and the respondent took as a preliminary objection the point that the case did not fall within the provision dealing with appeals as of right under which leave had been granted. In the course of the judgment Sir James Colville said: "The proper course, when such a "question as this arises, is to come here by petition as early "as possible, and before the cases are lodged, and the expense "of preparing those cases is incurred, in order to bring the point "before their Lordships, and to get the appeal dismissed. It is "then open to their Lordships to recommend Her Majesty either "to dismiss the appeal, in which case the parties are not put to "the expense of preparing for the hearing; or to grant special "leave to appeal."

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[1] (1835) 3 Cl. & Fin. 362, 371.
[2] (1876) 35 L.T. 869, 870.
[3] (1861) 14 Moo.P.C. 351, 353.
[4] [1927] A.C. 732.
[5] (1874) L.R. 5 P.C. 494, 500.

It seems clear to their Lordships that in theory at any rate appeals as to the incidence and quantum of costs might come within the provisions of paragraph (*b*) of article 3, or be the subject of special leave by the Board. Their Lordships are clear that in the present case there are no facts which would justify the granting of special leave.

For the above reasons their Lordships will humbly advise Her Majesty that the appeal be dismissed. The respondents to the petition must pay the costs of the present hearing and of the appeal.

Solicitors: *A. L. Bryden & Williams; Herbert Oppenheimer, Nathan & Vandyk.*

J. C.*
1955
July 13.

LEONG AND ANOTHER . . . . APPELLANTS;

AND

LIM BENG CHYE . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF THE FEDERATION OF MALAYA (IN THE COURT OF APPEAL AT PENANG).

Malaya—Will—Construction—Marriage condition—Gift of personalty—Condition subsequent—In partial restraint of marriage—No gift over—In terrorem condition—Interest not forfeited on remarriage—English rule applicable in Federation of Malaya—Intention of testator—To be extracted from the will—Extraneous evidence inadmissible.

Will. Colony—Application of local law—Applicability in local circumstances.

The English rule that a condition subsequent in partial restraint of marriage, when annexed to a bequest of personalty, is ineffective to destroy the gift unless the will in question contains an explicit gift over of the legacy to another legatee, is applicable in Penang.

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* *Present*: LORD RADCLIFFE, LORD TUCKER and MR. L. M. D. DE SILVA.

Principle in *Yeap Cheah Neo* v. *Ong Cheng Neo* (1875) L.R. 6 P.C. 381, at 393 applied.

Further, in so far as the rule is rested on intention of the testator, the intention relied on must be found within the four corners of the will itself and extracted from the contents of the will, and is not to be found or guessed at from extraneous circumstances or on a balance of probabilities.

Harvey v. *Aston* (1737) 1 Atk. 361; (1738) Willes 83 and *Wheeler* v. *Bingham* (1746) 3 Atk. 364 followed.

Dictum of Lord Loughborough in *Stackpole* v. *Beaumont* (1796) 3 Ves. 89, 95 considered.

A Chinese testator, resident in Penang, by clause 13 of his will provided that his residuary estate was to be divided equally amongst his two widows, his sons and a nephew, and that if any of the sons should die before the prescribed date of distribution leaving "a "lawful widow and female issue his share shall go to such lawful "widow and female issue equally if more than one, provided such "lawful widow shall remain the widow of such deceased son . . ." There was no gift over in the event of that condition not being fulfilled. One of the testator's sons having died before the date of distribution of the testator's residuary estate, leaving a widow and a daughter, the appellants, the widow married again before the date of distribution. On a summons to determine to whom the deceased son's share of the residuary estate was payable:—

Held, applying the English rule, that the condition or proviso must be treated as "merely in terrorem"—as intended merely in a monitory sense—and that the appellants were entitled to take the deceased son's share equally between them notwithstanding the remarriage of the widow.

There being no gift over in the event of the condition not being fulfilled, the share would not have fallen back into residue, if forfeited, but would have passed on intestacy as undisposed of by the will.

Order of the Court of Appeal reversed in part.

APPEAL (No. 33 of 1953) from an order of the Court of Appeal at Penang in the Supreme Court of the Federation of Malaya (February 13, 1953) reversing in part an order of the High Court of Penang (April 15, 1952).

The following facts are taken from the judgment of the Judicial Committee: This appeal from an order of the Court of Appeal, Supreme Court of the Federation of Malaya, related to two questions which arose in carrying out the testamentary provisions of a resident of Penang, Lim Kia Joo, deceased (hereinafter called "the testator").

The testator died on November 19, 1936, leaving a will made in Penang on August 21, 1936. Letters of administration de bonis non with the will annexed were granted to two administrators on May 7, 1939, and it was they who instituted an originating summons to determine the questions that were the subject of the present appeal. The persons who appeared respectively as appellants and respondent before the Board were interested parties. The main question in the appeal was whether the interests of the appellants Sally Leong and her daughter, Lim Eang Hoong, or the interest of Sally Leong alone, had been forfeited by a provision in the will requiring widows not to remarry. There was a subsidiary question as to the destination of the income of residue accruing prior to the date of distribution.

The testator's will was a document of some length and contained numerous dispositions. For the purposes of the appeal the important clause was clause 13, which constituted a bequest of residue. By earlier clauses the testator had given legacies to named grandchildren and daughters; had provided marriage portions for daughters by each of his two wives; had made certain dispositions by way of maintenance for his widows, infant sons and unmarried daughters, and provided for his house, 47, Northam Road, Penang, to be kept up as a place of residence for his family until the date when his residuary estate became distributable.

Clause 13 was a residuary bequest embracing all the testator's property except his property in China. It set up the usual trusts for sale, conversion and investment, and then proceeded as follows:

" Upon trust to pay out of the income of my residuary estate " in the first place and out of the capital thereof if such income " be insufficient the sums directed to be paid under clauses 9, " 10, 11 and 12 hereof and until my youngest son living at my " death shall attain the age of 21 years or if he shall die without " having attained the age of 21 years then until such time as " he would if living have attained such age. Upon trusts as to " both the capital and income of my residuary estate to pay and " divide the same equally among my said wives Yeoh Ah Eong " and Queh Ah Gaik and my sons Lim Beng Hong, Lim Beng " Choon, Lim Beng Sai, Lim Cheng Hooi, Lim Weng Hooi, Lim " Beng Chye and Lim Chit Bah, and my nephew Lim Joo Huat " the son of my elder brother Lim Niah Sah and any other sons " that may hereafter be born to me by my said wives Yeoh Ah " Eong and Queh Ah Gaik. Provided that if either of my said " wives shall not remain my widow or lead a chaste life or shall " die before the period fixed for the division of my residuary "estate her share shall go equally to my said sons Lim Beng "Hong, Lim Beng Choon, Lim Beng Sai, Lim Cheng Hooi, "Lim Weng Hooi, Lim Beng Chye and Lim Chit Bah my nephew "Lim Joo Huat and any other sons that may hereafter be born to "me by my said wives Yeoh Ah Eong and Queh Ah Gaik. And "provided that if any of my said sons Lim Beng Hong, Lim "Beng Choon, Lim Beng Sai, Lim Cheng Hooi, Lim Weng Hooi, "Lim Beng Chye and Lim Chit Bah, my nephew Lim Joo Huat "and any other sons that may hereafter be born to me by my "said wives shall die before the period fixed for the division of "my residuary estate leaving male issue his share shall go to "such male issue equally if more than one but if he shall not "leave any male issue but shall leave a lawful widow and female "issue his share shall go to such lawful widow and female issue "equally if more than one provided such lawful widow shall "remain the widow of such deceased son or nephew and lead a "chaste life."

The youngest son of the testator living at his death attained the age of 21 years on March 8, 1952, and that date therefore was the date fixed by the will for the distribution of residue. In the meantime, however, another son, Lim Beng Sai, had died on December 22, 1942, leaving a widow, Sally Leong, and a daughter, Lim Eang Hoong. His widow, Sally Leong, married again on August 13, 1949.

It was in those circumstances that the originating summons was taken out on November 9, 1951. The summons asked for, and later obtained, a representation order to cover the interests of all persons claiming to be residuary legatees under the will other than the present appellants. The court appointed the present respondent to appear in that capacity. Apart from that the summons, as later amended, raised two questions for the decision of the court. They were as follows:

"2. That it may be determined to whom, upon the true con- "struction of clause 13 of the will of the said deceased and in the "events which have happened, the share in the residuary estate "of the said deceased bequeathed to Lim Beng Sai, deceased, "provided that he survived the period of distribution, will be "payable.

"2*a*. Whether the surplus income of the said deceased's "estate is divisible and, if so, amongst whom, or whether the "same should be accumulated until the period of distribution."

The courts in Malaya returned divergent answers to question 2. In the High Court at Penang, Spenser Wilkinson J. decided that the appellants were entitled to share equally between them the share of residue bequeathed to Lim Beng Sai, notwithstanding the remarriage of Sally Leong, and made a declaration accordingly. The Court of Appeal (Mathew (C.J. Federation of Malaya), Murray-Aynsley (C.J. Singapore) and Pretheroe J.), on the other hand, made an order to the effect that neither of the appellants was entitled to any interest in the share of residue bequeathed to Lim Beng Sai, although the members of the court were not unanimous as to the forfeiture of the interest of the infant appellant. As to question 2*a*, both courts agreed in giving the answer that the surplus income of the residuary estate ought to be accumulated until the date of distribution and then distributed as part of residue.

1955. June 7, 8, 9. *Lionel Edwards Q.C.* and *W. S. Wigglesworth* for the appellants. The administrators are content to act as directed, and are not represented before the Board. The law applicable to the interpretation of the testator's will in relation to his personalty is the law of Penang, in particular in view of the facts that the will was made in Penang, was expressed in the terms of the law of that country and the testator had his permanent home there when he made his will and when he died. The law of Penang applicable to the interpretation of wills is the law of England as administered in the Chancery Division. *Yeap Cheah Neo* v. *Ong Cheng Neo* [1] shows that that law was introduced into Penang "as far as circumstances will admit," but this saving clause, while excluding from the law of Penang statutes relating to matters peculiar to England, did not exclude rules existing independently of statute, such as the rule against perpetuities: nor, it is submitted, did it exclude the rules applicable to conditions subsequent in restraint of marriage. Section 11 of the Courts Ordinance and section 3 of the Civil Law Ordinance of the Laws of the Straits Settlements and the Courts Ordinance, 1948, of the Federation of Malaya all support the view that the law applicable to the interpretation of wills is the same in Penang as it is in England.

It is a rule of law in England—now so firmly established that it ought not to be called in question—that a bequest of personalty to a widow subject to a condition subsequent in restraint of remarriage is treated as an absolute gift free from the condition if there is no gift over on breach of the condition—the condition

[1] (1875) L.R. 6 P.C. 381, 393.

is treated as being in terrorem only—although the condition is effective and determines the enjoyment of the bequest if there is a gift over on breach of the condition. There are many authorities in support of this view: *Marples* v. *Bainbridge*,[2] where it was said that " when there is a bequest, like the present, " of personal property, upon a condition subsequent, and no " bequest over on breach of the condition, the condition is con- " sidered only in terrorem." The court leans against forfeiture in a will. In Lord Hardwicke's time the rule was treated as too well-established even to be questioned: *Wheeler* v. *Bingham.*[3] See also *W.* v. *B.*,[4] *In re Pettifer*[5] and *In re Whiting's Settlement.*[6] The last cited case was not an application of the rule—there was a gift over—so it is not directly in point, but it shows the weight which the Court of Appeal attached in a case such as this to the maxim stare decisis. [Reference was also made to Jarman on Wills, 8th ed. (1951), vol. 2, pp. 1520–30, and Theobald on Wills, 11th ed. (1954), pp. 534–6.]

The rule is applicable here and the condition is merely in terrorem because there is no gift over. There appears to be no case, where the appropriate circumstances exist, of an exception to the in terrorem rule. It is academic and idle to debate whether it is a rule of law or of construction; it is both. Admittedly, the English law on this subject is not entirely logical. The authorities show that where the in terrorem rule expressly applies motive will not be considered. The in terrorem rule should be applied in the present case—it has been applied for a number of centuries—and the justification for asking the Board to apply the rule is not a logical justification, but is that the law should be known and should be certain. *In re Packard*[7] establishes that a mere residuary gift is insufficient to count as a gift over for the purposes of the merely in terrorem rule.

The rule was admittedly one of those imported from the Roman civil law into the law administered by the English Ecclesiastical Courts when those courts were dealing with suits for legacies and the distribution of residuary personalty, but the jurisdiction of those courts in these matters (according to Holdsworth's History of English Law, 2nd ed. (1937), vol. 6, p. 652) had to all intents and purposes been taken over by the Court of Chancery by the end of the sixteenth century. The Court of Chancery took over these rules when it took over this jurisdiction and from then on these rules formed part of the law administered by the Court of Chancery and as part of that law were exported to Penang.

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[2] (1816) 1 Madd. 590, 592.
[3] (1746) 3 Atk. 364, 367.
[4] (1849) 11 Beav. 621.
[5] [1900] W.N. 182.
[6] [1905] 1 Ch. 96; 21 T.L.R. 83.
[7] [1920] 1 Ch. 596, 601.

Two of the judges in the Court of Appeal (Mathew C.J. and Pretheroe J.) seem to have considered that if the condition against remarriage were enforced the forfeited share would accrue to the other beneficiaries and that there was therefore no need for a gift over to support the condition, but it is submitted that in the absence of an express gift over the forfeited share would have to devolve as on an intestacy, as a forfeited share of residue does not fall into residue.

In the absence of a gift over the court will not speculate on the testator's intentions, but will apply the merely in terrorem rule even though the court in fact doubts whether the testator, if asked, would have confirmed that he actually did intend the condition to be merely in terrorem. *Scott* v. *Tyler*[8] shows that Thurlow L.C. did not regard the rule as founded on intention. [*In re Dickson's Trust*[9] was referred to.] If, however, the question turns on the testator's intention, then he must be regarded as having intended to treat his own widows and his sons' widows differently, since there is a gift over in the event of his widows remarrying, whereas there is no gift over in the event of his sons' widows remarrying. Further, if intention is the test, it has to be the intention which the testator expresses in his will. Murray-Aynsley C.J. relied on a statement of Willes C.J. in *Harvey* v. *Aston*[10] for the proposition that the testator's intention might be ascertained by reference to Chinese custom, and in that report of *Harvey* v. *Aston*[10] Willes C.J. did appear to suggest that a testator's intention might be known in "other "ways," but the opinion of Willes C.J. on the point is, it is submitted, better reported in Willes' reports under the name of *Harvey* v. *Aston*,[11] from which it appears that he was speaking of intention expressed in the will. It is submitted that the court will not by any question of construction entertain speculations about a testator's intentions based upon so-called custom as indicating the sort of thing that a man of the testator's type or kind would be likely to have intended.

Intention, it is submitted, is not, however, the test in a case of personalty given to a widow subject to a condition subsequent in restraint of marriage without a gift over. Mathew C.J. relied on an observation of Blackburn J. in *Jones* v. *Jones*[12] for the view that intention was the test, but that was a different case. The cases where intention was considered appear to have been cases where there was a gift over. In any event, it is not legitimate in this case to seek to ascertain the testator's intention by reference to Chinese custom. It lies at the centre of the appellants' case that custom is a word which is capable of two quite distinct meanings: (i) habit, or (ii) a custom that has been established and assimilated into a system of law. There is no suggestion here that there is any proof or hint of Chinese custom assimilated into any established system of law. The will itself shows that the remarriage of widows was not contrary to Chinese custom—it is quite plain that it does allow the remarriage of widows. Further, even though the law administered by the English Ecclesiastial Courts was exported to Penang so far as the customs of the local inhabitants would admit, there is no reference to local custom in relation to the export of the law administered by the Court of Chancery: *Yeap Cheah Neo's* case.[13]

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[8] (1788) 2 Bro.C.C. 431, 487–8.

[9] (1850) 1 Sim.N.S. 37.

[10] (1737) 1 Atk. 361, 377.

[11] (1738) Willes 83, 96.

[12] (1876) 1 Q.B.D. 279, 281.

There is an alternative ground on which the condition can be attacked, namely, that it offends the rule against perpetuities and is void on this account also. There is nothing to limit the operation of the condition (if it has any operation) to the period before the distribution date. The seven sons and the nephew might before the distribution date have married wives born after the testator's death and those wives might be widowed before the distribution date and remarry thereafter. A forfeiture to take effect on remarriage in these circumstances would be too remote and the gift would have effect free from the condition: *In re Talbot* [14] and *In re Engels*.[15]

In any event, and by way of further alternative, the granddaughter's half of the deceased son's share ought not to be forfeited by reason of her mother's remarriage. It would be a most capricious and, indeed, a most unjust provision if a testator really intended to provide that an infant granddaughter should forfeit her share if her mother did not lead a chaste life. It is submitted that on construction the proviso itself refers only to the widow. Assuming that the mother would not take, the child would take the whole share.

As regards the question of surplus income, the appellants submit that the two wives, the seven sons and the nephew were given present vested interests in the residuary estate, and a present vested residuary gift of personalty carries the intermediate

[13] L.R. 6 P.C. 381, 393.

[14] [1933] Ch. 895; 49 T.L.R. 462.

[15] (1943) 168 L.T. 311; [1943] 1 All E.R. 506.

income even though the gift (as here) is liable to be divested. Further, clause 13 of the will contains a provision for the payment and division of income which, it is submitted, on the true construction of the clause is sufficient to give surplus income pending the date for division of capital to the residuary legatees until that date or until the divesting of their interests. Reliance is also placed on the absence of any hint of a direction for accumulation.

Henry Salt Q.C. and *William Lindsay* for the respondent. The questions are: (1) Whether this disputed share stands forfeited or unforfeited; if it is forfeited it is submitted that there must be pro tanto a partial intestacy because it cannot accrue to other shares of residue, there being no provision to that effect, nor is it in any sense a class gift. So the first question is really a contest between partial intestacy on the one hand and the appellants' claim of no forfeiture on the other hand. [The next-of-kin are almost but not quite identical with the residuary legatees.] (2) The testator died domiciled not in England but in Malaya: but equally he was a Chinaman, and he was affected by personal law and custom as well as by the law of Malaya. The English law is only made applicable in Malaya so far as circumstances admit, because there may be personal law and custom which qualifies and varies it. (3) The gift is only in partial restraint of marriage, and the condition at the end of clause 13 is clearly not void as a condition; the only question is whether the condition is merely in terrorem and therefore ineffective.

The Judicial Committee is not bound by any of the decisions which have been cited in this case—all but one are decisions of first instance. This doctrine or rule of construction can be displaced not only by expression on the face of the will but by surrounding circumstances which are proper to be taken into account. It can be displaced by having regard to the personal law and custom of a Chinaman domiciled in Malaya. In the first place, English law applies in Penang only so far as circumstances render it admissible: *Yeap Cheah Neo* v. *Ong Cheng Neo*[16]; *Cheang Thye Phin* v. *Tan Ah Loy.*[17] Those authorities go to show that the English law yields to the special circumstances and must give way to matters of public policy which apply in the colony. The latter case shows that even the English Statutes of Distribution, exported to the Straits Settlements, apply there only sub modo to allow for a plurality of Chinese widows. The same applies a fortiori to any rule of construction; when it comes to construing the will of a Chinaman who died in 1936, and who made a will with a view primarily of conforming with his national custom of maintaining and supporting his family—making family provision—one is fully entitled in that case to treat a rule of construction as being displaced by those circumstances.

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[16] L.R. 6 P.C. 381, 393.

[17] [1920] A.C. 369.

There is a sharp distinction in English law between a rule of law and a rule of construction, and the latter may be displaced by two things: (i) by other indications in the will, and (ii) by surrounding circumstances which it is proper to take into account. It is here only a rule of construction; it is a question of intention, and it is clear on the face of the will that forfeiture was here intended. The Board should say that in a case of this kind the testator really meant what he said when he provided divesting provisions. The will contains several such divesting conditions, some accompanied, and some not accompanied, by an express gift over. It would be capricious to hold that some of the gifts were, and others were not, effectively forfeited. Admittedly there has been built up a rule of construction that a bequest of personalty divestable upon remarriage in the case of a widow is not effectively divested unless there be a gift over; that is the general effect of the law; but it should be borne in mind that although that body of law has been built up in this country, there are nevertheless cases which clearly show that an intention to the contrary may be gathered from other parts of the will and from extraneous circumstances. Reliance is placed on the passage in *Harvey* v. *Aston*[18] which states that "it is laid down as a rule that governs any devise of personal "estate, that where there is no devise over, the condition is only "in terrorem; but I rather take it this is laid down as a rule to "construe the testator's intention, but not that it is in all events "a general rule, that such conditions shall be in terrorem only, "unless there are words of limitation over, for the testator's "intent may be known in other ways." This quite irrational rule cannot apply in this case where there is a Chinese custom against remarriage. It would be contrary to custom for a Chinese testator, in making provision by his will for his family, to provide out of his estate benefits to enure for the widow and female offspring (or alternatively for the widow) of a deceased son after she should, by remarrying into another family, place herself and

[18] 1 Atk. 377.

such offspring (or alternatively herself) outside the circle of the testator's family.

Nothing a testator or settlor can do can oust the rule against perpetuities or the rule in *Shelley's* case; they are both rules of law as contrasted with rules of construction and cannot be displaced. If, as here, it can be displaced, it must be a rule of construction, and one which the Court of Appeal were right in saying was displaced when one looks at the surrounding circumstances. *Wheeler* v. *Bingham* [19] is in the respondent's favour, and *Stackpole* v. *Beaumont* [20] tends to show that the rule was founded on public policy as much as on intention. In this case the rule of construction should yield to the contrary intention and to surrounding circumstances. *In re Dickson's Trust* [21] shows that the rule was regarded by Lord Cranworth as irrational, ill-established and not to be extended. See also *Stackpole* v. *Beaumont*,[20] *per* Lord Loughborough L.C., who called it a rule of construction.

The testator in his will, and particularly in clause 13, manifested a clear intention that the widow and female offspring (or alternatively the widow) of a son dying before the date of distribution should not participate by substitution or otherwise in any part of his residuary estate from the moment and in the event of such widow ceasing before the date of distribution to remain the deceased son's widow. The provision for divesting was in the premises (a) not in any way contrary to public policy, and (b) was not merely in terrorem, but was valid and effective notwithstanding the absence of any express gift over; so that the disputed share, or, alternatively, the moiety thereof claimed by the appellant Sally Leong, was or became undisposed of by the testator's will.

In so far as the doctrine is founded on public policy rather than on intention of the testator, it is only a fragment of Roman imperial law which has been engrafted, in one instance only, on the general principles of the common law through the Ecclesiastical Courts and later by the Court of Chancery. To apply the Roman Emperors' worship of fecundity at yet a third remove to the will of a Chinese testator dying in Penang in 1936 would be merely to defeat his intentions and his personal law or background, and would be far removed from the reality of the case.

This being a future gift, vested but liable to be divested, the corpus does not carry the intermediate income. It may, of course, be disposed of expressly, but in the absence of express disposition it goes as on intestacy. The surplus intermediate income should be withheld until the date of distribution and passes as undisposed of to the testator's next-of-kin: *In re Oliver*[22]; *In re Gillett's Will Trusts.*[23]

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[19] 3 Atk. 364.

[20] (1796) 3 Ves. 89.

[21] 1 Sim.N.S. 37.

It is too late for the appellants to take the perpetuity point. In any case the latest vesting is, on construction, the date of distribution, which is not too remote.

Edwards Q.C. in reply. It was said for the respondent that the testator's intention can be gathered from circumstances outside his will, and for that proposition reliance was placed on the observations of Willes C.J. in *Harvey* v. *Aston* as reported in Atkyn's Reports.[24] But the report of that case to be found in Willes Reports, prepared from that judge's own notes, is the more reliable one,[25] and indicates that "other ways" relates only to expressions of intention contained in a will. In any case, the submission for the respondent turns on the in terrorem rule being based on presumed intention. But intention, it is contended, is not the basis of the rule: *Scott* v. *Tyler*[26]; and *In re Dickson's Trust*[27] points in the same way. Reading the cases as a whole, the explanation of the rule is to be found in history; it was adopted from the civil law, which was founded on public policy. It has been whittled away and the in terrorem rule is what has remained; but it was and still is founded on public policy. It is academic whether it is a rule of law or of construction; but even if the latter, it makes no difference to this case, because a rule of construction will be applied in Penang in exactly the same way as a rule of law would be applied: there is nothing to prevent the court from applying the rule in this case. There is an express gift of the surplus income to the beneficiaries entitled from time to time to the shares. The will should not be so construed as to lead to a partial intestacy.

July 13. The judgment of their Lordships was delivered by LORD RADCLIFFE, who stated the facts set out above and continued: The divergence of view that has separated the two courts below arises in the application of the rule of English law which relates to conditions in partial restraint of marriage when imposed upon bequests of personalty made by will. It is common ground that a condition as to the remarriage of a widow is a partial restraint for this purpose. Their Lordships do not think that it is possible to solve the disputed question without saying something as to the origin and nature of the English rule.

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[22] [1947] 2 All E.R. 162, 166.

[23] [1950] Ch. 102; 65 T.L.R. 727; [1949] 2 All E.R. 893.

[24] 1 Atk. 361.

[25] Sub nom. *Hervey* v. *Aston* (1738) Willes 83, 95.

[26] 2 Bro.C.C. 431, 487–8.

[27] 1 Sim.N.S. 37.

In English law, property, whether real or personal, can be validly limited to a person until marriage. The ambit of this rule is confined to conditions attached to devises or bequests of property and it does not relate to limitations themselves. Moreover, although it was the view of Mr. Jarman that, subject to certain established exceptions, conditions precedent were as much within the rule as conditions subsequent, it is only necessary for the present purpose to tread on the surer ground of conditions subsequent. As to these, while a condition in general restraint of marriage is prima facie void, at any rate when imposed upon a gift of personalty, a condition in partial restraint of marriage is certainly not void and is capable therefore of receiving legal recognition. But on the further point, how far and under what conditions such recognition should be given, the law differed in its treatment of realty and personalty. For, whereas a condition subsequent in partial restraint of marriage was effective to determine the estate in the case of a devise of realty even without any new limitation to take effect on the forfeiture, so that a residuary devisee or heir came in of his own right, it was early determined and consistently maintained that a condition subsequent in partial restraint of marriage, when annexed to a bequest of personalty, was ineffective to destroy the gift unless the will in question contained an explicit gift over of the legacy to another legatee. And for this purpose a mere residuary bequest was not treated as a gift over.

One thing at least is certain about this rule: it exists. As early as 1737 a court consisting of Comyns J., Willes L.C.J., Lee L.C.J. and Hardwicke L.C., thought it settled law that, in the absence of a gift over, such a condition was ineffective to defeat a bequest (*Harvey* v. *Aston* [1]); and the note appended by Mr. Sanders, the editor of the reports (loc. cit. p. 381) shows how abundant the authority was for that proposition. When it was referred to again in 1746 in *Wheeler* v. *Bingham*,[2] Lord Hardwicke reaffirmed it as a settled rule of the court that the condition was void without a gift over. There are many other cases in which it has been asserted, and at least several in which the rule or the general branch of the law to which it belongs has been criticized as being undesirable and unsatisfactory (see, e.g., *In re Dickson's Trust*,[3] *In re Catt's Trusts*,[4] *Stackpole* v. *Beaumont*[5] and *In re Whiting's Settlement*[6]). Lord Loughborough L.C., indeed, thought it "beyond imagination" how a Christian country could have adopted the rule of the Roman law with regard to conditions as to marriage, and complained that it was "impossible to reconcile the authorities or to range them under "one sensible, plain, general rule" (*Stackpole* v. *Beaumont*[5]). But Lord Loughborough did not have the occasion to propound a plain general rule of his own: and his observations in the case were later characterized by Mr. Jarman as failing to "evince "that respect for authority and established principles which has "characterized his successors": Jarman on Wills, 7th ed., Vol. II, p. 1503. So, with this possible exception, it would be true to say that not even the critics have doubted the validity of the rule, so long as it is confined to the limited terms in which it has been stated above.

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[1] (1737) 1 Atk. 361.

[2] (1746) 3 Atk. 364.

It is a more difficult task to rationalize such a rule or to ascertain precisely what are its limits or of what exceptions it may permit. And that is the difficulty which has led to the difference of opinion in the present case. It is commonly said that such a condition is treated by the courts, in the absence of a gift over, as being "merely in terrorem" (see, e.g., Theobald on Wills, 11th ed., p. 534; Jarman on Wills, 7th ed., Vol. II, p. 1442). The phrase is scarcely a happy one if its only purpose is to describe a situation in which the law will not permit the legatee to have anything to be afraid of. In any event, the phrase merely describes the effect of the rule: it does not account for it. Not unnaturally, judges have from time to time sought to explain its basis. But they have not always agreed in their explanations. Willes L.C.J. thought that it was "laid down as a rule to "construe the testator's intention," treating the gift over as being one, but not necessarily the only, way by which a testator could unequivocally express his intention that the condition he imposed should be effective (*Harvey* v. *Aston*[7]). But an explanation that is based on the testator's presumed intention does not offer any satisfactory answer to the query why, in that case, adequate evidence of serious intention is not provided by the very condition that the legacy is to be forfeited; a condition which, in the case of realty, effectively performs its apparent purpose. So, in *Wheeler* v. *Bingham*,[8] Lord Hardwicke L.C. dealt with the matter rather differently. In his view "the "strength of the evidence of the testator's intent that the legacy "should cease . . . is not the reason that has governed the "court. There have been abundance of cases here, where the "intention of the testator was full as strong that the legacy "should cease . . . yet the intention only did not prevail." He concluded, therefore, that the true ground for making the condition effective as a forfeiture was not intention, but the right of a third party to come in and claim his bequest, if there was a gift over.

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[3] (1850) 1 Sim.N.S. 37, 44.
[4] (1864) 2 Hem. & M. 46, 52.
[5] (1796) 3 Ves. 89, 95.
[6] [1905] 1 Ch. 96; 21 T.L.R. 83.
[7] 1 Atk. 361, 377.

In their Lordships' opinion it is not possible, at this stage of its history, to give an account of the origin of the rule that is wholly logical. It is known that the general conception of public policy upon which is based the invalidity of any conditions tending in restraint of marriage was derived by the Ecclesiastical Courts of this country from Roman law by way of the civil law, and the Courts of Chancery related their own rules to the rules of the Ecclesiastical Courts. But this general conception was never adopted by English law as a whole, and all that can be said is that the courts of this country settled for themselves within what limits and under what conditions they would treat bequests of personalty in English wills as subject to the principle of the civil law. Once the rule had become established, it was probably convenient to attribute its operation to an intention ascribed to the testator himself rather than to the influence of a principle of public policy adopted from the civil law and never more than partially recognized in this country. At the same time, it is obvious that it is only in a special sense that the presumed intention of the testator can be treated as the ground of the matter, for in truth the intention is forced upon him by the law rather than displayed by himself. No doubt it is quite satisfactory to say that, if the will contains an express gift over, that gift shows beyond doubt that the testator did not intend that the condition should be merely in terrorem. But it is equally satisfactory, and perhaps less complicated an approach, to follow Lord Hardwicke in saying that it is the presence in the will of the express gift over that determines the matter in favour of the forfeiture. So, it has been suggested, would an express revocation of a bequest that is bound by a similar condition. In any event, in so far as the rule is rested on intention, their Lordships do not feel any doubt that the intention relied upon must be found within the four corners of the will itself and extracted from the contents of the will. To introduce any method of ascertaining the intention which goes beyond this and allows it to be found or guessed at from extraneous circumstances or on a balance of probabilities is to introduce a principle which is foreign to the very basis of testamentary construction, and their Lordships know of no authority in support of it. Certainly the judgment of Willes L.C.J. in *Harvey* v. *Aston*,[9] which was cited by the respondent's counsel in this connexion, is not to be treated as such an authority: for when the report in Atkyns is compared with the report in Willes, which was prepared by Mr. Durnford from the actual manuscript of Willes L.C.J., it is seen that the learned judge's reference to "other ways" of discovering intention relates to expressions of intention contained in a will and not evidence of intention imported aliunde (see 1 Atkyns at 377 and Willes 95, 96).

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[8] 3 Atk. 364, 366.

If the rule is applied in this sense to the testator's will, it does not appear to their Lordships that there can be any doubt as to the result. The bequest that is in question is the share of residue originally destined for Lim Beng Sai but given over in the event to the appellants, his widow and daughter. To this bequest is annexed the simple proviso that the widow is to remain a widow and lead a chaste life. There is no gift over in the event of that condition not being fulfilled: nor does the share fall back into residue, if forfeited. As a lapsed share of residue it would pass on intestacy as undisposed of by the will. The condition or proviso must therefore be treated as "merely in "terrorem," that is, as intended merely in a monitory sense, and the appellants are entitled to take the share equally between them, notwithstanding the remarriage of Sally Leong.

This conclusion is in accordance with the order of the High Court at Penang dated April 15, 1952, in disposing of question 2 of the originating summons, and, in their Lordships' view, the learned judge, Spenser Wilkinson J., correctly applied the relevant law. It is necessary now to say something as to the reasons which led the three members of the Court of Appeal at Penang to take a different view and to reverse his order on this point.

The reasons given by the learned judges were not in all respects the same. All of them, however, were impressed by the fact that, taking the will and its many separate provisions as a whole, they could feel confident that the testator did not intend the proviso at the end of clause 13 to be "merely in terrorem." He "meant what he said." It is, of course, true that in several places in the will the testator showed a wish that widows should not remarry or that their interests should be forfeited if they did, in one case expressly giving over a share in such event. In fact, the provisions vary in expression and, possibly, in result. But their Lordships do not see how it is possible to deduce from the different provisions attached to other bequests in other parts of the will anything more that throws light upon the testator's intention than what is afforded by the particular provision itself. And that is a provision that a widow is not to remarry. The question still remains what legal effect is to be given to such a provision; and, as Lord Hardwicke pointed out long ago, mere weight of intention, in the absence of a gift over or something equivalent to it, is not sufficient to displace the rule. Indeed, it might be argued with equal force that the fact that the testator did attach a gift over to a similar condition in another part of clause 13 but did not make any gift over after this proviso tells against an intention to make an effective forfeiture of Lim Beng Sai's share. Their Lordships think that the method of construction thus adopted is an unsound one when a rule such as the "in terrorem" rule is in question.

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[9] 1 Atk. 361.

Pretheroe J. supported his conclusion by treating Lim Beng Sai's share as returning to the general fund of residue on the widow's remarriage and so as avoiding a partial intestacy and any necessity for a gift over. But this conclusion is based on a mistaken view as to the law, since the share, if forfeited, could not go back to residue: it must go as on intestacy. Murray-Aynsley C.J. attached special importance to the fact that the testator was a Chinaman and that, as he said, the remarriage of widows is contrary to custom among Chinese of the old-fashioned kind. From this he drew the inference that the testator did not intend his provision to be "merely in terrorem" and did intend an effective forfeiture. But this approach appears to their Lordships to be open to the serious objection that, even supposing intention to be the sole determining consideration, it derives its evidence of intention from a speculation as to what the testator would have been likely to intend, and not from any particular expressions that are found in the will itself. And the reasons relied upon by Mathew C.J. are open to the same criticism, although he supports his conviction as to the testator's intention not so much by reliance on racial custom as on the fact that his basic intention was to preserve his estate for those members of his family who remained within it.

Having regard to what has been said earlier as to the origin and scope of the rule, it does not appear to their Lordships that considerations such as those which weighed with the learned members of the Court of Appeal are sufficient to affect its application. To determine the construction of a will by them is to open the door to the uncertainty of what is not unfairly called speculation as to a testator's intentions, and in the long run it is not in the interest of testators or their beneficiaries that this should be permitted. Nor is this particular rule one that can be simply dismissed as a rule for ascertaining and giving effect to intention.

It is not difficult to see that the considerations which have influenced the Court of Appeal can be plausibly restated in the proposition that the rule of English law ought not to be applied by the courts in Malaya, having regard to the differences of race and social custom that separate the one country from the other. Something like this proposition was indeed advanced by the respondent's counsel in his argument on the appeal. The rule in question, it was said, was a rule of construction only, which, originating with an attempt to correct a social malady that prevailed in one period of the Roman Empire, had found an ambiguous and rather restricted lodging in one part of the law of England. It would be wrong to resort to it when dealing with the construction of wills made by residents of Malaya, many of whom inherit customs and traditions very different from those of the English race.

Their Lordships are far from denying that there is force in an argument on these lines. It is very natural to see something anomalous in the introduction into Malaya of a special rule of English law of this kind. But English law itself has been introduced into Penang, as part of the Straits Settlements, "so far as "it is applicable to the circumstances of the place" (*Yeap Cheah Neo* v. *Ong Cheng Neo*[10]); and, while so much of that law as can be said to relate to matters and exigencies peculiar to the local condition of England and to be inapplicable to the conditions of the overseas territory is not to be treated as so imported, their Lordships are of opinion that the process of selection cannot rest on anything less than some solid ground that establishes the inconsistency. And it is any solid ground of that sort which is lacking in this case; not the less when it is recalled that the testator made his will in the English language, and employed in it forms and legal conceptions that are wholly derived from English law. In fact, if the English law was so far imported into Penang as to nullify through the rule against perpetuities a Chinese lady's testamentary disposition relating to a family burying place and a house for performing religious ceremonies to the memory of her dead husband (see *Yeap Cheah Neo* v. *Ong Cheng Neo* [10]), it would be very hard to say why there was not also imported the English rule as to the effect of conditions in partial restraint of marriage.

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[10] (1875) L.R. 6 P.C. 381, 393.

It was said that the rule against perpetuities was a rule of law, whereas the rule now in question was no more than a rule of construction. But the distinction proposed does not appear to their Lordships to be a significant one. This rule, too, is a rule of law in the sense that every court is bound to apply it and give effect to it, once it is clearly ascertained what are its terms and under what conditions it is required to operate. It is not merely a rule of construction, since its history shows that it owes its existence to a particular conception of what public policy required, even though that conception never prevailed in the English law as a whole. Yet there is nothing that is peculiar to the local conditions of England or, for all that appears, anything necessarily inappropriate to the circumstances of Malaya, in a reluctance on the part of courts of law to allow a person's decision whether or not to enter the state of matrimony to be overhung by a condition that forfeits his or her interest in property according to the decision, or in a rule that requires any forfeiture, if it is to be enforced by the courts, to be carried through in explicit terms by a gift of the forfeited property to some other person. And this, where it is applicable at all, is what the "in terrorem" rule in effect amounts to.

Their Lordships note, for the purposes of record, that the appellants' counsel desired to argue that the provision against remarriage was also void as infringing the rule against perpetuities. As no such point appears to have been raised in the courts below, and their Lordships would not have had the benefit of the opinions of the courts in Malaya upon it, they did not think it right to allow it to be argued for the first time before them.

With regard to the question 2*a* raised by the summons, the appellants' counsel stated that he did not wish to dispute the

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[10] (1875) L.R. 6 P.C. 381, 393.

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propriety of the order made in the High Court, if the decision on the main question were to go in their favour. There is no cross-appeal on the point and their Lordships therefore assume, without deciding, that the decision of the High Court was correct.

Their Lordships will humbly advise Her Majesty that the appeal should be allowed so far as relates to that part of the order of the Court of Appeal that declares that the appellants are not entitled to the share of the residue of the estate of the testator bequeathed to Lim Beng Sai, deceased; and that in lieu of that declaration there should be substituted the declaration that appears under subhead (1) in the order of the High Court dated April 15, 1952. Both the appellants and the respondent are willing that the costs of this appeal, taxed as between solicitor and client, should be paid out of the testator's estate, and their Lordships direct accordingly.

Solicitors: *Bull & Bull; Bulcraig & Davis.*

[HOUSE OF LORDS.]

MADRAS ELECTRIC SUPPLY CORPORATION LD. . . . . APPELLANT;

AND

BOARLAND (INSPECTOR OF TAXES) . RESPONDENT.

H. L. (E.)*

1955
Jan. 31;
Feb. 1, 2, 3;
Mar. 11.

Revenue—Income tax—Crown—Succession to trade—Sale of electricity undertaking to Crown—" Person succeeds to any trade . . ."—Person includes Crown—Balancing charge—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch. D, Rules applicable to Cases I and II, r.* 11 (2) (*as substituted by Finance Act,* 1926 (16 *&* 17 *Geo.* 5, *c.* 22), *s.* 32 (1))*—Income Tax Act,* 1945 (8 *&* 9 *Geo.* 6, *c.* 32), *s.* 17 (1).

Crown—Prerogative—Revenue. " Person."

By rule 11 (2) of the Rules applicable to Cases I and II of Schedule D to the Income Tax Act, 1918 (as substituted by section 32 (1) of the Finance Act, 1926): "If at any time after "the said April 5 any person succeeds to any trade, profession or "vocation which until that time was carried on by another person "and the case is not one to which paragraph (1) of this rule "applies, the tax payable for all years of assessment by the person "succeeding as aforesaid shall be computed as if he had set up or

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* *Present*: LORD OAKSEY, LORD MACDERMOTT, LORD REID, LORD TUCKER and LORD KEITH OF AVONHOLM.

"commenced the trade, profession or vocation at that time, and "the tax payable for all years of assessment by the person who "until that time carried on the trade, profession or vocation shall "be computed as if it had then been discontinued. In this paragraph references to a person include references to a partnership."

On August 29, 1947, the undertaking, plant and machinery of a company in India were purchased by the Madras Government, acting as a branch of the Crown. An assessment to income tax for the year of assessment 1947–48 was made on the company under section 17 of the Income Tax Act, 1945, in respect of a balancing charge alleged to arise on the sale of the plant and machinery:—

Held, that rule 11 (2) was applicable to the case of a succession to a trade by the Crown, since the word "person" therein included the Crown by necessary implication, for the reasons which required the scope of charging provisions to be limited so as not to include the Crown were inapplicable; and accordingly that the assessment was rightly made, since by the joint effect of rule 11 (2) and section 31 (1) (*a*) of the Finance Act, 1926, the year of assessment in which the sale took place was its own basis period for the purposes of the balancing charge.

Per Lord Oaksey and Lord Tucker. It is unnecessary to decide whether the Crown's immunity from taxation depends upon the construction of the statute or arises from the prerogative.

Per Lord MacDermott. The Crown cannot find in the prerogative an immunity from tax if a statute, according to its true construction, includes the Crown amongst those made liable to a tax it imposes; but in an Act of Parliament general words shall not, as a rule of construction, bind the Crown to its prejudice unless by express provision or necessary implication.

Per Lord Reid. A general taxing provision must be construed in light of the "implied exemption on the ground of the prerogative."

Per Lord Keith. That the Crown is not bound by a statute, unless by express words or by clear implication, necessarily involves that words in a statute capable of applying to the Crown may be overridden by the exercise of the prerogative.

Decision of the Court of Appeal (sub nom. *Boarland* (*Inspector of Taxes*) v. *Madras Electric Supply Corporation*) [1954] 1 W.L.R. 87; [1954] 1 All E.R. 52 affirmed.

APPEAL from the Court of Appeal (Singleton, Birkett and Hodson L.JJ.).

This was an appeal from an order of the Court of Appeal dated December 9, 1953, dismissing an appeal by the appellant company, Madras Electric Supply Corporation Ld. (in liquidation) from an order of the High Court (Upjohn J.) dated June 18, 1953, whereby an appeal by the respondent, Harold Victor Boarland (Inspector of Taxes), from a determination of the Commissioners for the Special Purposes of the Income Tax Acts on a case stated by them was allowed and their decision was reversed.

The point in issue was whether the Government of Madras, being for this purpose a branch of the Crown, was a "person" within the meaning of rule 11 (2) of the Rules applicable to Cases I and II of Schedule D to the Income Tax Act, 1918.

An assessment to income tax for the year of assessment 1947–48 for balancing charges was made in the estimated sum of £850,000 on the appellant company under section 17 of the Income Tax Act, 1945, in respect of the sale by the company of its electric light and power undertaking in Madras, and the machinery and plant belonging to it, to the Government of Madras on August 29, 1947. As from that date the Government succeeded to the trade and the company ceased trading. The undertaking was sold as a going concern and was taken over and carried on as previously by the purchaser. Depreciation allowances on the assets transferred had been received in previous years by the company to an extent which justified an assessment for balancing charges, provided it could properly be made with reference to the period in which the sale occurred. The company's normal basis period for assessment was its own accounting period immediately preceding the year of assessment.

It was common ground between the parties before the Special Commissioners "(1) that by reason of section 17 (1) of the Income "Tax Act, 1945, the balancing charges forming the subject of the "assessment under appeal fell to be made upon the company (if "at all) for the year of assessment in the company's basis period "for which the sale of its plant and machinery occurred; (2) that "for the purposes of the said Act such sale occurred on August "29, 1947; (3) that, by reason of section 57 (2) of the said Act, "the company's basis period for the year of assessment 1947–48 "was the period on the profits or gains of which income tax for "that year fell to be computed under Case I of Schedule D in "respect of its trade."

The contentions on behalf of the respondent in support of the assessment before the Special Commissioners were as follows:— "(1) that on August 29, 1947, there was a succession to the "company's trade, which brought into operation the provisions "of rule 11 (2) of the Rules applicable to Cases I and II of "Schedule D; (2) that by virtue of the said rule 11 (2) the tax "payable by the company for all years of assessment fell to be "computed as if the trade had been discontinued on that date; "(3) that by virtue of section 31 (1) (*a*) of the Finance Act, "1926" (which deals with the permanent discontinuance of a trade), "the company fell to be charged to income tax for 1947–48

" on the amount of the profits or gains for the period beginning " April 6, and ending August 29, 1947, and that that period was " the company's basis period for 1947–48; (4) that the sale of the " company's plant and machinery occurred in its basis period for " 1947–48; (5) that accordingly the assessment was correctly " made, subject to final adjustment of the figures."

The contentions on behalf of the appellant company before the Special Commissioners in opposition to the assessment were as follows:—" (1) that the person succeeding to the company's " trade on August 29, 1947, was the Crown, and that rule 11 (2) " had no application to a case where the Crown succeeded to a " trade; (2) alternatively, that if the Crown did not succeed to " the trade, the person so succeeding was not a person chargeable " to income tax in respect thereof, and that rule 11 (2) has no " application where the person succeeding to the trade in question " is not so chargeable; (3) that section 31 of the Finance Act, " 1926, did not apply to the company in relation to the year " 1947–48 or any relevant year; (4) that the company's basis " period for 1947–48 was the preceding year, namely, the year to " December 31, 1946; (5) that the sale did not occur in the company's basis period for 1947–48, and that the assessment was " therefore bad."

The Special Commissioners accepted the company's first contention that the purchaser of the trade was not a " person " within the meaning of rule 11 (2), and allowed the appeal of the company against the assessment to the balancing charges. At the request of the respondent they stated a case for the opinion of the High Court pursuant to section 64 of the Income Tax Act, 1952. The case stated by the Special Commissioners came on for hearing in the High Court on May 12 and 13, 1953, before Upjohn J., who on June 18, 1953, gave judgment allowing the appeal and reversing the determination of the Special Commissioners. The appellant company appealed to the Court of Appeal, and on December 9, 1953, the Court of Appeal gave judgment dismissing the appeal and affirming the decision of the High Court.

J. Millard Tucker Q.C., *Kenneth Diplock Q.C.* and *G. B. Graham* for the appellant company. The relevant statutory enactments are section 1 of the Income Tax Act, 1918, Schedule D, Case I, and rule 11 (2) of the Rules applicable to Cases I and II of Schedule D; sections 29, 31 and 32 of the Finance Act, 1926; sections 16, 17, 22, 25 (1) (iii), 57 (1) (2), and 68 of the Income Tax Act, 1945; section 175 of the Government of India

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Act, 1935; sections 7 (1) (*b*), 8 (3), 9 (1) (*a*) (*c*) of the Indian Independence Act, 1947; the India (Provisional Constitution) Act Order, 1947 (dated August 14, 1947, and made by the Governor-General of India under that Act). Subject to the amendments of the Order, the Act of 1935 remained in force in India until January 26, 1950, when India became a republic: see India (Consequential Provision) Act, 1949.

There may be confusion if the rule governing the construction of statutes relating to the Crown is not properly and succinctly stated. The normal rule is that statutes are made for subjects and therefore general words in an Act referring to "persons," "occupiers," "married women" or "property" are not to be construed as including the Sovereign, whether in a personal or corporate capacity, unless the Crown is expressly named in the Act or included by necessary implication, or the nature of the Act is such as to indicate that the Crown is included. Otherwise the Crown is never brought within the scope of any statutory provisions which might prejudice its interests if they applied to it. The enacting body is the Sovereign with the consent of Parliament, and prima facie an Act imposing duties or obligations or monetary liability on persons, property or rights is never construed as including the person, property or rights of the Crown. But if any of the conditions previously mentioned is satisfied the Crown must obey the Act, for the prerogative is of no avail against a statute. The Court of Appeal in this case approached the matter wrongly in accepting that the Crown's immunity from taxation depended on the prerogative.[1] Admittedly, if the word "person" in the relevant provisions includes the Crown, this appeal must fail, but in income tax Acts it never includes the Crown. But if the word were taken to include the Crown one would reach the absurdity that the Crown must pay income tax. Its immunity from tax depends not on the prerogative but on construction of the Acts, because inherently the Crown is not a taxable person.

On the true construction of Schedule D to the Act of 1918 the word "person" means every person except the Crown, whereas the false basis of the judgment of the Court of Appeal is that the Crown is within the charging words but can claim an overriding exemption by virtue of the prerogative. It is the other way about. By virtue of the prerogative the Crown is not included in the Act but if on the true construction of the Act it is found to fall within it, then the prerogative is of no avail. Rule 11 (2) of the rules applicable to Cases I and II of Schedule D must be construed in the context in which it is found, and there the Crown was not legislating for itself any more than in any other Act, The Crown is not there included in the word "person" any more than in other places Her Majesty is included in the term "married woman."

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[1] [1954] 1 W.L.R. 87, 93, 97; [1954] 1 All E.R. 52.

The prerogative cannot override a statute: see *Attorney-General* v. *De Keyser's Royal Hotel Ld.*[2] If the Crown is not named in a statute it is not bound by it: *Mersey Docks and Harbour Board Trustees* v. *Cameron.*[3] The expressions in *Coomber* v. *Berkshire Justices*[4] do not mean that the Crown's exemption only comes in to limit the operation of an enactment which, unless so limited, would apply to Crown property. See also *Rex* v. *Cook*[5] and the *Case of Magdalen College, Cambridge.*[6] Reliance is placed on Bacon's Abridgement, 3rd ed. (1768), vol. IV, p. 198, and 7th ed. (1832), vol. VI, p. 462; *Attorney-General* v. *Donaldson*[7]; *Gorton Local Board* v. *Prison Commissioners* (1887)[8]; *Attorney-General* v. *Hancock*[9]; and *Bombay Province* v. *Bombay Municipal Council.*[10] See also *Attorney-General for Ceylon* v. *Silva*[11] and *Stewart* v. *Thames Conservators.*[12] It is to be noted that the Post Office is not liable to income tax because its trade is carried on by the Crown.

On the true construction of rule 11 (2) the word "person" there is not apt to include the Crown and does not include it. Nothing in that rule gives the word any different meaning from that which it bears in the charging provisions of paragraph 1 of Schedule D. Even if the rule is not itself a charging provision, it is so closely connected with the charging provisions that the word "person" must have the same meaning in it.

This construction is supported by the wording of the preamble to the Finance Act, 1947, repeating in substantially similar form that of all the previous Acts imposing income tax, including the Income Tax Act, 1799. If the word "person" were apt to include the Crown the combined effect of the Income Tax Act,

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[2] [1920] A.C. 508, 526; 36 T.L.R. 600.

[3] (1865) 11 H.L.C. 443, 511.

[4] (1883) 9 App.Cas. 61, 71, 74, 76, 79.

[5] (1790) 3 Term Rep. 519, 520, 521.

[6] (1615) 11 Co.Rep. 66b.

[7] (1842) 10 M. & W. 117, 123–7.

[8] [1904] 2 K.B. 165n, 167.

[9] [1940] 1 K.B. 427, 428, 435–6; 56 T.L.R. 286; [1940] 1 All E.R. 32.

[10] [1947] A.C. 58, 61; 62 T.L.R. 643.

[11] [1953] A.C. 461; [1953] 2 W.L.R. 1185.

[12] [1908] 1 K.B. 893; 24 T.L.R. 333.

1918, and the Finance Act, 1947, would be to charge income tax on the annual profits and gains accruing to the Crown. But such a construction must be wrong because the Commons cannot "freely and voluntarily give and grant" to the Crown a part of what already belongs to it. When it is desired that the Crown should be made liable to a Parliamentary tax imposed on subjects, this must be effected by a special enactment: see Crown Private Estate Act, 1800, and Crown Private Estates Act, 1862. The appellant company's contention is supported by the provisions of the Act of 1918 as originally enacted and the previous enactments re-enacted by them: see rule 9 of the rules applicable to Cases I and II of Schedule D (brought in by section 62 of the Taxes Management Act, 1880); rule 11 (for which the present rule 11 was substituted by section 32 (1) of the Finance Act, 1926), and rule 3 of the Miscellaneous Rules of Schedule D. All these interlocking rules dealt with changes of ownership of a trade and with the person succeeding to a trade. See also Income Tax Act, 1842, s. 100, rules applicable to Cases I and II of Schedule D, rule 4, and also section 134. Rule 11 (2) is clearly bound up with all the provisions which impose the charge, and when "person" is referred to there and in section 134 the legislature is not purporting to include the Crown in the general word. See also section 83 of the Duties on Income Act, 1799 (39 Geo. 3, c. 13). Reliance is placed on *Income Tax Commissioners for City of London* v. *Gibbs*,[13] where it is said that "person" in rule 9 means "an entity of assessment." The same is true of rule 11.

As to the use of the word "person," see also sections 116 (1) and 132 (2) of the Act of 1918. In the Act the word is sometimes used without relation to the question whether or not the "person" is liable to tax. In such a case the meaning depends on the context, but such examples do not bear on the question whether or not the Sovereign is a "person" for the purposes of the Act.

Kenneth Diplock Q.C., following. The word "person" in the context of these Acts means one inherently taxable, someone who may be liable to tax if certain conditions are fulfilled. Paragraph 1 of Schedule D is limited to such persons and the Crown is not such a "person." General words in an Act of Parliament are not apt to include the Crown save by necessary implication displacing the prima facie rule of construction. The rule is stated in Bacon's Abridgement, 7th ed., vol. VI, pp. 462–3, and

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[13] [1942] A.C. 402, 419; [1942] 1 All E.R. 415.

Chitty's Prerogatives of the Crown, p. 383. So far as paragraph 1 of Schedule D is concerned, on no principle of construction can the Crown be included in the word "person" because the Act imposes a tax liability. Since the Crown has no prerogative power to overrule an Act of Parliament, the exclusion of the Crown can rest only on the basis that the words are not apt to include it. It is purely fortuitous whether the effect of the argument for the appellant company is to benefit the taxpayer or the Crown, and accordingly the question of prejudicing the Crown does not arise. However the rule is stated, "person" here must be construed so as not to affect the Crown. Prima facie, under the ordinary rule of construction, "person" must have the same meaning wherever it occurs in this Act. There is nothing in rule 11 (2) to compel one to say that "person" there has an extended meaning.

Sir Reginald Manningham-Buller Q.C., A.-G., J. H. Stamp and *Sir Reginald Hills* for the respondent. The company has been rightly assessed to income tax in respect of balancing charges in pursuance of section 17 of the Income Tax Act, 1945, for the year of assessment 1947–48, because it is not disputed that it sold its undertaking (including plant and machinery) as a going concern to the Government of Madras.

The only issue is the meaning to be given to the word "person" in rule 11 (2). On this point it is a fallacy to say that the Crown is inherently non-taxable: see the Crown Private Estates Act, 1862. Nor is it established by the authorities that general words in an Act of Parliament are not apt to include the Crown. General words do not suffice to cut down the prerogative; but that is a different proposition. The Crown prerogative does not affect the construction of this Act. If on its true construction an Act does not affect the Crown, it need not rely on the prerogative to repel any claim based on that Act. The prerogative only arises when the Act, on its true construction, might apply to the Crown, which can then invoke the prerogative in order to defeat the operation of the Act in relation to itself.

It is a fundamental fallacy to contend that the word "person" excludes the Crown unless the contrary is shown; it includes the Crown unless the contrary is shown. The word should be given the widest possible interpretation, and there is no ground for cutting it down in a way which, while it might benefit one taxpayer would prejudice another. No assistance is found in going to the preambles of the Acts, as counsel for the appellant company have done. It is a non sequitur to say that words like "person" or "married woman" cannot be construed as including the Crown. "Person" includes the Crown and "married woman" includes Her Majesty. But, unless its operation is cut down by express words, the prerogative will prevent any Act from prejudicing the Crown, for the basis of the Crown's immunity is the prerogative. It is only because the word "person" is apt to include the Crown that it may be the recipient of a grant under section 3 (3) of the Forestry Act, 1919. The Crown can consent to its prerogative being cut down by express words in an Act of Parliament, but, unless it is clear that it has so assented, the prerogative is not so cut down; it then remains in operation and can be relied on by the Crown.

Before the Interpretation Act, 1889, the Crown was regarded as a person: see Co. Lit., vol. I, p. 15b, note 4; Blackstone's Commentaries, 1st ed., vol. I, p. 457; and the *Case of Magdalen College, Cambridge*.[14] In the Interpretation Act see section 1 (1) (*b*) and the broad definition of "person" in section 19. As to the construction of the word "person" generally in an Act of Parliament, see *Pharmaceutical Society* v. *London and Provincial Supply Association Ld.*,[15] and as to the exemption of the Crown depending on the prerogative, *Rex* v. *Cook*.[16]

The word "person," unless a contrary intention appears, must have a wide meaning. In rule 11 (2) there appears no contrary intention, nor does anything appear in the charging provisions of Schedule D: see *per* Upjohn J. in the present case.[17] "Person" means the same thing in both places. There is no particular magic in the fact that the words of rule 11 (2) are said to be "charging words." The rule is not a charging rule; it is merely dealing with the computation of the liability on a successor to a trade. Its object is to secure an adjustment by allowance or charge where there is a succession, irrespective of who the successor may be. That object would be in part defeated if a narrow construction were given to the word "person." Here one is only concerned with the meaning of "person" in rule 11 (2). Accordingly it is not essential to establish that it applies to the Crown in the charging provisions of Schedule D. That is not decisive in dealing with rule 11 (2), the language and purpose of which would in any event justify the wider interpretation. The words of rule 11 (2) are apt to cover any transfer, no matter to whom it is made. It is not really a charging rule but a method of computation.

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[14] 11 Co.Rep. 66b.

[15] (1880) 5 App.Cas. 857, 868–9.

[16] 3 Term Rep. 519, 520–1, 522.

[17] [1953] 1 W.L.R. 920, 927; [1953] 2 All E.R. 467.

The meaning of the word "person" is not cut down by the exercise of the prerogative; the admitted immunity of the Crown from taxation is based on the prerogative right to claim that immunity. Though on its true construction the Act applies to the Crown, the prerogative comes into play to prevent its operating to the prejudice of the Crown.

The appellant company is in substance seeking to persuade the House to disregard *Coomber* v. *Berkshire Justices*,[18] the basis of which was not that the Income Tax Acts should be restricted in their operation but that, despite their clear language, the Crown was exempt by reason of the prerogative. If the construction of the Act had been narrowly restricted the Crown would not have had to rely on the prerogative at all. This case is a very powerful authority for the respondent and the House should follow its ratio decidendi.

The parts of the decision of the Court of Appeal in *Bank voor Handel en Scheepvaart N.V.* v. *Administrator of Hungarian Property*[19] are unaffected by the decision of the House of Lords, which gives no support to the proposition that the prerogative can affect the construction of the words of a statute, affecting their meaning. It is a novel proposition that an Act must be qualified on construction in accordance with the royal prerogative. If it had been so there would have been no scope for waiver in that case: see *per* Lord Reid.[20] One cannot waive an immunity unless one is first liable and so the charging provisions of these Acts apply to the Crown. The Crown must waive its rights if it wishes the Acts to apply to its property. The prerogative is effective until it is waived; it is not necessary for it to be asserted in every case. The argument for the respondent in *Bank voor Handel*[21] is similar to that now advanced for the Crown.

The trustees of a charity are "persons" within the Income Tax Acts, but are exempt from tax by reason of special provisions. In the same way the Crown is a "person" but is exempt just as if there were an express exemption in the Act. The fact that the exemption exists does not mean that the Crown is not a person.

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[18] 9 App.Cas. 61, 65, 71, 76–7, 79.

[19] [1953] 1 Q.B. 248; [1952] 2 T.L.R. 861; [1952] 2 All E.R. 956 (C.A.); [1954] A.C. 584; [1954] 1 All E.R. 969.

[20] [1954] A.C. 584, 624–5.

[21] Ibid. 595.

The principles of *Fry* v. *Burma Corporation*[22] apply to this case. *Income Tax Commissioners for City of London* v. *Gibbs*[23] has no relevance. See also the Income Tax Act, 1918, s. 30, and Sch. A, No. VII and No. VIII.

In summary, this appeal is solely concerned with the meaning of "person" in rule 11 (2), the aim of which is only achieved by giving the word the meaning contended for by the respondent. The intention to include the Crown is apparent, and if "person" in Schedule D must always bear the same meaning it is included. The Crown is exempted not because it is not a "person" but by reason of the prerogative. It is really novel to seek to limit, on the ground of the prerogative, the meaning of general words in a statute which do not cut down the prerogative. Further, relying on the Interpretation Act, 1889, s. 19, no "contrary "intention appears" in Schedule D as to the construction of the word "person." There is nothing in the preamble to any of the relevant Acts suggesting that the Crown is not a "person," though, like the Charity Commissioners, who are also "persons," it is exempt. It is not sought to challenge the proposition that the prerogative can be limited by the express words of an Act, but it cannot be cut down by general words. General words do not bind the Crown, which is not the same thing as saying that they do not include it. Where general words are used the prerogative is not restricted. The construction of an Act depends on the language used.

J. H. Stamp following. If rule 11 stood alone no one could doubt its meaning. Beyond doubt it would apply to every case in which a trade changed hands. It is suggested on behalf of the appellant company that the word "person" has acquired an artificial meaning in the Act and in rule 11. This involves two subordinate propositions: (1) that the meaning of the word is restricted by way of construction in that the charging provisions of Schedule D exempt the Crown, and (2) that the restriction is annexed to the word throughout the Act. The Crown challenges both propositions. There is no ground for treating the word or construction otherwise than if there were no Crown prerogative. But, since the prerogative exists, the question is: how does it affect the operation of the Act? The ambiguous words of the preamble could not override the clear meaning of the word "person" which is not capable of being so cut down. It is a clear and unambiguous word and includes the Crown (section 19 of the Interpretation Act, 1889). Does the prerogative affect the operation of the Act by a construction of the word "person" restricting its application and altering its meaning? Or does it provide the Crown with a defence to claims made on it in its character as a person? The court must consider whether the Act or the prerogative prevails, having regard to the fact that the Crown is not bound by an Act unless named in it or included by necessary implication. There is not enough in the Income Tax Act to exclude the prerogative. So how does the prerogative prevail? By altering the words of the Act or by overruling them for this purpose? By the latter method. The prerogative protects the Crown from assessment. The commissioners will not in practice assess when they know that they have no right to do so, though apart from the prerogative the words of the Act cover the Crown; so, though the prerogative is there the Crown need not in practice rely on it. Suppose the Duke of Wellington had been exempted by statute from taxes—he would have been in the same position as the Crown, but he would still have been a "person." The effect of an exemption is not to alter the meaning of any Act of Parliament. The true view is that the Crown is in the same position as the Charity Commissioners, who are exempted from tax by this Act. That only means that special words overrule the general words.

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[22] [1930] A.C. 321, 327, 331, 334.

[23] [1942] A.C. 402.

The appellant company's argument produces an absurd result in that it makes a vital difference whether the transfer is to the Crown or to someone else, and an absurd result throws doubt on the validity of the reasoning leading to it.

This Act does not bind the Crown either by express words or by necessary implication. Assuming, against the respondent's contention, that the prerogative operates by annexing a restriction to the construction of the word "person," what restriction would it be right to imply? Either that for the purposes of a charge under Schedule D the Crown is not a "person," and that is wrong, or else that the word "person" does not include the Crown, and that is wrong, too.

The legislature's knowledge that the prerogative exists has no bearing on the construction of the Act, which operates according to its words in expressing the mind of the legislature. The legislature leaves the impact of the prerogative to the words of the Act.

Under Schedule A there is a general charge on hereditaments. Crown lands fall within it as a matter of construction but are exempted.

J. Millard Tucker Q.C. in reply. The immunity of Crown officers and servants and money applied for Crown purposes was the whole point of the *Bank voor Handel* case.[24] It was argued that the contention of the appellant company would produce hardship in defeating the end of the legislature. But the court is not to legislate under the guise of interpretation. It must interpret, even if the results are untoward as in *Inland Revenue Commissioners* v. *Dowdall, O'Mahoney & Co. Ld.*[25]

The argument that the Crown is within the interpretation of the Act but escapes from it by the prerogative is contrary to sections 1 and 2 of the Bill of Rights (1 W. & M., sess. 2, c. 2).

Their Lordships took time for consideration.

Mar. 11. LORD OAKSEY. My Lords, this is an appeal from an order of the Court of Appeal (Singleton, Birkett and Hodson L.JJ.) dated December 9, 1953, dismissing an appeal by the appellant company from an order of the High Court (Upjohn J.) dated June 18, 1953, whereby an appeal by the respondent from a determination of the Commissioners for the Special Purposes of the Income Tax Acts upon a case stated by those commissioners was allowed and the decision of the commissioners was reversed.

The matter arises upon an assessment to income tax for the year of assessment 1947–48 for balancing charges made in the estimated sum of £850,000 upon the appellant company under section 17 of the Income Tax Act, 1945, in respect of the sale by the company of its undertaking and the machinery and plant belonging to it to the Government of Madras on August 29, 1947. The undertaking was sold as a going concern, and was taken over and carried on as previously by the purchaser, and it is agreed that the purchaser succeeded to the trade of the appellant company on August 29, 1947.

It is agreed that in these circumstances the company was liable to balancing charges in respect of the sale of its plant and machinery, and further that such balancing charges were correctly assessed for the year of assessment 1947–48 if the purchaser of the company's undertaking was a "person" within the meaning of rule 11 (2) of the Rules of Cases I and II of Schedule D of the Income Tax Act, 1918. If, however, the purchaser was not a "person" within the Rules, such balancing charges could not be assessed for the year 1947–48 as, unless rule 11 (2) applied, the basis of assessment for that year would be the profits of the previous year which would not include the said balancing charges. The point in issue in the appeal is, therefore, whether the purchaser, the Government of Madras, being for this purpose (as is admitted by the respondent) a branch of the Crown, was a " person " within the meaning of rule 11 (2), the contention for the appellant company being that neither the Crown nor any person exercising the functions of the Crown is a " person " within the meaning of the rule, so that no " person " succeeded to the undertaking of the company.

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[24] [1954] A.C. 584.

[25] [1952] A.C. 401; [1952] 1 T.L.R. 560; [1952] 1 All E.R. 531.

There is no dispute as to the construction and effect of the provisions of the Income Tax Act, 1945, which impose balancing charges. The balancing charge is to be made for the year of assessment in the " basis period " for which the disposal of the machinery or plant takes place, and the " basis period " for the year of assessment 1947–48 in the present case is the period on the profits of which income tax for that year falls to be computed under the directions contained in the Rules of Cases I and II of Schedule D of the Income Tax Act, 1918, and in subsequent amending enactments.

These directions (so far as they affect the question in dispute) are as follows:—(a) Section 31 (1) (*a*) of the Finance Act, 1926, provides that where in any year of assessment a trade is permanently discontinued, the profits of the trade for the period from the beginning of the year (April 6) to the date of discontinuance shall be the profits to be charged to income tax under Cases I and II of Schedule D for that year. (b) By section 32 of the Finance Act, 1926, the present rule 11 was introduced by amendment into the Rules of Cases I and II of Schedule D and was substituted for the previous rule 11 contained in those rules. Paragraph (1) of the rule deals with successions to a trade as the result of the formation of a partnership or a change in a partnership in circumstances which admittedly do not apply to the facts of the present case.

Paragraph (2) of rule 11 (in which the meaning of the word " person " is the issue in this appeal) is in the following terms: [His Lordship read the paragraph and continued:] If the succession by the Government of Madras to the trade of the appellant company was the succession of a " person " within the meaning of rule 11 (2) of the Rules of Cases I and II of Schedule D, the " basis period " for the year of assessment 1947–48 will admittedly be the period from April 6, 1947, to August 29, 1947, in which said period the sale of the machinery and plant took place, and the assessment for that year in respect of the balancing charges will admittedly be competent, the joint effect of rule 11 (2), if it applies, and section 31 (1) (*a*) of the Finance Act, 1926, being that the year of assessment in which the sale takes place is its own " basis period."

If, however, rule 11 (2) was not applicable to the succession by the Government of Madras, the " basis period " for the year of assessment 1947–48 would, according to the rule for computing profits in the normal case when not displaced by rule 11 (2), be the preceding accounting year, namely, the year to December 31, 1946. As the sale of the plant and machinery did not take place in that period no assessment could be made for a balancing charge on account of it for the year of assessment 1947–48, and the assessment for that year which was made would not be competent. An assessment for the year 1948–49 would also not be competent, as in that year the appellant company was not carrying on a trade. Accordingly, if rule 11 (2) was not applicable, the balancing charges which would otherwise have been assessable for 1947–48 escape assessment.

The Income Tax Act, 1945, enacted a revised and extended general code of capital allowances in the taxation of the profits of business undertakings, and in Part II thereof made special provisions as regards machinery and plant. A new feature of these allowances was the provision, upon the acquisition by a trader of machinery or plant, of an initial allowance in respect of a percentage of its cost as well as an annual allowance of a specified amount representing the annual depreciation in value of the machinery or plant as previously provided by rule 6 of the Rules of Cases I and II of Schedule D.

Where the machinery or plant is disposed of by a trader before the initial and annual depreciation allowances in respect of it have amounted to its full cost and, upon its disposal, the value received falls short of the balance of its cost, it is provided by section 17 of the Act that a balancing allowance shall be claimable by the trader in respect of such balance in reduction of his chargeable profits. Conversely, in the event of the value received upon such disposal being in excess of the written down value of the machinery and plant, a balancing charge may be imposed upon the trader, so as in effect to restore to the public revenue the amount in respect of past allowances for income tax which is shown in the result to have been excessive.

[His Lordship set out the course of the proceedings and continued:] In your Lordships' House the Attorney-General and

Mr. Stamp contended that as a matter of construction the Crown is included in the persons chargeable to tax under the Income Tax Acts, but that the Crown obtains immunity from taxation by the prerogative right to claim such immunity. In the respondent's printed case the argument is expressed as follows:—" (7) Because " the Crown is upon accepted principles of English law a person " and comes within the ordinary meaning of that word in an Act " of Parliament. (8) Because the immunity of the Crown from " taxation is based upon the prerogative right to claim such " immunity and not upon the construction of the word ' person ' " in a taxing Act as excluding the Crown."

My Lords, I agree with my noble and learned friend, Lord Tucker, that it is unnecessary in this case to decide whether the Crown's admitted immunity from taxation depends upon the construction of the statute or arises from the prerogative in some other way. In the present case the only question is whether rule 11 (2) applies to the case of a succession by the Crown to a trade previously carried on by a person taxable under the Income Tax Acts. I have come to the conclusion, though not without some doubt, that, whatever the construction of the word " persons " in the charging provisions of Schedule D may be, it must necessarily be implied that the person succeeded is not deprived of his right to balancing allowances and remains liable to balancing charges when the Crown succeeds to his trade. It cannot, I think, have been intended that in cases where the Crown succeeds to a trade the taxpayer whose trade is taken over should be affected in the matter of income tax. Either that must be the necessary implication of the statute, or the Crown would be entitled by asserting the prerogative to claim to make the balancing charges but not bound to allow the balancing allowances. The words " the tax payable for all years of assessment " by the person succeeding " must, I think, be construed to mean the tax, if any, and not to deprive the taxpayer of balancing allowances to which he would have been entitled, because his successor is not taxable.

For these reasons I would dismiss the appeal.

LORD MACDERMOTT. My Lords, this appeal challenges the validity of an assessment under Schedule D of the Income Tax Act, 1918, made upon the appellants for the tax year 1947–48 in respect of balancing charges under section 17 of the Income Tax Act, 1945, which were alleged to arise on a sale of the appellants' plant and machinery. The dispute now lies within a narrow compass, and the only question calling for determination by your Lordships is as to the true construction of rule 11 (2) of the Rules applicable to Cases I and II of Schedule D.

In these circumstances the situation which makes rule 11 (2) decisive may be stated briefly and with a minimum of detail. On August 29, 1947, the appellants transferred their electric light and power undertaking in Madras to the Crown. As from that date the Crown succeeded to the appellants' trade and the appellants ceased trading. The transfer was by way of sale and included the plant and machinery already mentioned. Depreciation allowances on these assets had been received in previous years by the appellants to an extent that justified an assessment for balancing charges, provided such assessment could properly be made with reference to the period in which the sale occurred. The appellants' normal basis period for assessment was their own accounting period immediately preceding the year of assessment, and this meant that, had the appellants continued trading, the balancing charges in question would have been payable on foot of an assessment for the tax year 1948–49. An assessment for that year could not, however, be made as trading had ceased during the previous year; and an assessment for the tax year 1947–48, based on the appellants' previous accounting period, would have been ineffective to impose liability for these balancing charges as the sale which evoked them took place subsequent to that period. These difficulties do not, however, confront the present assessment for 1947–48, the last year of trading, if rule 11 (2) applies, for in that event section 31 (1) of the Finance Act, 1926, would operate to make the relevant basis period that which began on April 6, 1947, and ended when the appellants' machinery and plant had been sold.

Rule 11 (2) therefore becomes the crux of this litigation. [His Lordship read the paragraph and continued:] The applicability of this rule, accordingly, depends on whether the transfer to the Crown of the appellants' undertaking comes within the words "If at any time . . . any person succeeds to any trade . . . "which until that time was carried on by another person . . . ." And this, in turn, depends on whether the word "person" as first used in this context includes the Crown. That is the governing issue. If the Crown is included the assessment is competent and the appeal fails. If the Crown is not included, rule 11 (2) does not apply, the assessment is bad and the appeal succeeds.

For the appellants it was contended that in the charging provisions of paragraph 1 of Schedule D in respect of the annual profits or gains arising or accruing "to any person residing in the "United Kingdom" the word "person" did not, on its true construction, include the Crown, and that there was nothing in the language or subject-matter of rule 11 (2) of that Schedule to give the same word there a different meaning. Against this an argument in alternative form was advanced on behalf of the respondent. First of all, it was said that "person" in the charging provisions of paragraph 1 of Schedule D included the Crown and that rule 11 (2) used the word in the same sense. And, secondly, it was submitted that even if "person" in paragraph 1 did not include the Crown, the language and purpose of rule 11 (2) justified a wider interpretation which would include the Crown.

My Lords, the meaning of the word "person" in the charging provisions of paragraph 1 of Schedule D was vigorously canvassed at your Lordships' bar, and counsel for the respondent took the first branch of their argument, logically enough, the length of saying that the Crown's undoubted immunity from tax under Schedule D flowed not from the construction of the statute but from the assertion, or at any rate the existence, of a prerogative right. In seeking to show that the decision of the Court of Appeal was wrong, Mr. Millard Tucker, for the appellants, contended that it had accepted that view, and he relied upon certain passages in the judgments of Singleton and Hodson L.JJ. as indicating this to be the case. When these judgments are read in their entirety I am by no means certain that they were meant to go quite as far as this, though they do contain observations such as "It is, however, recognized that the freedom of the "Monarch from taxation arises by virtue of the prerogative" (Singleton L.J.[1]), and "When the Act has been construed, the "Crown is entitled to set up its right against the construction if "prejudiced thereby, and the construction will, when necessary, "yield to the prerogative" (Hodson L.J.[2]). Some of the authorities cited in the course of the hearing also contain expressions which, when read literally, appear to relate the Crown's immunity from tax to the prerogative. But in those cases the distinction between ascribing this immunity to the prerogative and treating it as a matter of statutory construction was not the subject of dispute, and I do not think much can be built on the use of a phraseology which was never directed to the point now under consideration and which was sufficient for the purposes in connexion with which it was used. It may, indeed, be said that for most purposes it matters little whether one attributes the Crown's immunity from taxation to the existence of a prerogative right or to a construction of the taxing statute that respects that right. In the present appeal, however, the choice between these ways of explaining the position of the Crown is relevant to the issue and was regarded by both parties as having an important bearing upon it.

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[1] [1954] 1 W.L.R. 87, 93; [1954] 1 All E.R. 52.

[2] [1954] 1 W.L.R. 87, 97.

My Lords, I consider the appellants to be right on this particular matter. Whatever ideas may once have prevailed on the subject, it is, in my opinion, today impossible to uphold the view that the Crown can find in the prerogative an immunity from tax if the statute in question, according to its true construction, includes the Crown amongst those made liable to the tax it imposes. The appropriate rule, as I understand it, is that in an Act of Parliament general words shall not bind the Crown to its prejudice unless by express provision or necessary implication. That, however, is and has long been regarded as a rule of construction, and such being its nature its application to the charging provisions of paragraph 1 of Schedule D seems to me to make an end of the respondent's submission on this aspect. In that paragraph the word " person " is a general word capable of including the Crown, but there is no express provision and nothing by way of necessary implication to make it include the Crown, and so, as a matter of construction, it must be read in accordance with the rule as excluding the Crown.

The question, then, is whether the word is to receive a similar construction in rule 11 (2) or whether it is there used in a less restricted sense and so as to include the Crown.

The presumption that the same word is used in the same sense throughout the same enactment acknowledges the virtues of an orderly and consistent use of language, but it must yield to the requirements of the context, and it is perhaps at its weakest when the word in question is of the kind that readily draws its precise import, its range of meaning, from its immediate setting or the nature of the subject with regard to which it is employed. In the present instance it seems to me that paragraph 1 and rule 11 (2) of Schedule D are so different in their subject-matter and purpose that the word " person " must be given a different connotation in each. Paragraph 1 is intended to impose a tax and, in conformity with the rule of construction I have mentioned, the Crown is not bound because, if it were, it would be by its inclusion to its prejudice in the general word " person." Rule 11 (2), on the other hand, is not intended to impose a tax or to do anything prejudicial to any of the persons to whom it refers. It may work now one way and now another, but its object is not to add to the liabilities of the taxpayer but to provide for terminal computations in the case of a trade changing hands. It does not purport to tax those who were not taxable before, and I am unable to see how its provisions can prejudice the Crown so as to justify its exclusion from the word "person" as used therein. Moreover, so to exclude the Crown would be to ignore and run counter to the natural meaning of rule 11 (2) and its obvious purpose. It is expressed in terms—" . . . any time . . . any person . . . any "trade . . ."—which are designedly comprehensive, and it caters for a situation which is there to be met whether or not it is the Crown that succeeds to or is succeeded in the trade in question.

For these reasons I am of opinion that the assessment was competent, and I would therefore dismiss the appeal.

LORD REID. My Lords, the appellants have been assessed to income tax in respect of balancing charges under section 17 of the Income Tax Act, 1945, arising from a sale of plant and machinery, which was in use by them in their electricity undertaking in Madras until the Government of Madras, who are admitted to have been the Crown, in 1947 exercised an option to purchase the undertaking. It is admitted that the Crown succeeded to the appellants' trade within the meaning of the Income Tax Acts, and it is further admitted that if the appellants' successor in their trade had been anyone else but the Crown there would be no ground for the present appeal.

The sole point at issue in this case is the meaning of the word "person" in rule 11 (2) of the Rules applicable to Cases I and II of Schedule D. That rule provides—[His Lordship read the paragraph and continued:] It is common ground that if the word "person" where it first occurs in that rule includes the Crown the appeal fails, but if it does not then the appeal succeeds.

It is not disputed that the Crown is in law a person, and the respondent's first argument is that the word "person," wherever it appears in the Income Tax Acts, includes the Crown. The appellants, on the other hand, argued that the word "person" in the Income Tax Acts never includes the Crown. In my opinion both these arguments are unsound.

It is common ground that the Crown does not have to pay income tax, but the reason for that is in dispute. The rule is often stated in the form that an Act does not bind the Crown unless the Crown is bound expressly or by necessary implication. But neither party accepts that as an accurate or sufficient statement of the rule. It is said for the respondent that as a matter of construction the Crown is within the scope of the words of all the charging provisions of the Act; it is a person and could be assessed for tax, but if it were, it could plead the royal prerogative and decline to pay; when it is said that the Crown is not bound what is meant is that, although the terms of an Act apply to the Crown, the Crown can by the exercise of the prerogative prevent the Act from being applied so as to prejudice its interests. The appellants, on the other hand, say that the prerogative operates at an earlier stage, and that unless an Act binds the Crown expressly or by necessary implication the Crown is never brought within the scope of any of its provisions which might operate to prejudice Crown interests if they applied to it; so, as a matter of construction, the word "person" in the Income Tax Acts must be held to mean "person other than the Crown."

My Lords, this argument for the respondent is novel. I do not think that it has ever been suggested, at least since 1688, that, if an Act in its terms and on its true construction applies to the Crown, its operation can be prevented by the royal prerogative. It is true that there does not appear to be in the authorities any statement which precisely negatives this argument, but that is not surprising. As the point has never been raised it has not been necessary to formulate the answer to it.

Chitty states the rule as follows: "But Acts of Parliament "which would divest or abridge the King of his prerogatives, his "interests or his remedies, in the slightest degree, do not in "general extend to, or bind the King, unless there be express "words to that effect." (Prerogatives of the Crown, p. 383.) I draw attention to the words "extend to, or bind the King." It is not a matter of the King preventing the operation of an Act which extends to the Crown, but of the scope of provisions which prejudice the Crown being so limited that they never extend to the Crown.

The respondent relied on *Coomber* v. *Berkshire Justices.*[3] In that case it was held that the justices were entitled to plead, against the Crown, immunity from taxation in respect of certain buildings used for what were held to be Crown purposes. Lord Blackburn there speaks of "the exemption, by virtue of the "prerogative,"[4] of Crown property, and of "an implied exemp"tion on the ground of prerogative,"[5] and Lord Watson speaks

[3] (1883) 9 App.Cas. 61.

[4] Ibid. 66.

[5] Ibid. 71.

of "the privilege of the Crown."[6] But I do not find in any of the speeches anything to suggest that this exemption or privilege only comes in after the Act has been passed to limit the operation of provisions which, until so limited, apply to Crown property, or that it does not limit the scope of the Act by preventing it from ever applying to such property. The case is notable in that the justices successfully invoked the prerogative against the Crown. This is intelligible if the operation of the prerogative was to exclude entirely from the scope of the Act property used for certain "Crown" purposes, whoever it might belong to. The justices could then say that on a true construction of the Act it did not apply to, or make them liable in respect of, this property, and that the Crown, by making a demand for tax, could not alter the true construction of the Act. But if the true view were that the Act did apply in the first instance and the prerogative had then to be invoked to prevent its operation, I find it difficult to see what right the justices could have themselves to invoke the prerogative against the will of the Crown.

I shall not multiply references because, the present question not being in issue, the language used was not directed to it and is generally capable of more than one interpretation. But I might add a passage from the judgment of Wrottesley J. in a recent case, *Attorney-General* v. *Hancock*,[7] "the rule is now "well laid down and clear that if an Act of Parliament would "otherwise devest the Crown of its property, rights, interests or "prerogative, it is not to be construed as applying to the Crown "unless the Crown is mentioned either expressly or by necessary "implication."

I must, however, deal with the case *Bank voor Handel en Scheepvaart N.V.* v. *Administrator of Hungarian Property*,[8] because a passage in my speech is said to assist the respondent on this question. The Custodian of Enemy Property had paid income tax on a sum which came into his hands, and the sole question was whether when he paid the tax assessed on him he was liable to do so. I agreed with the majority that he was not. I said at one point[9] that: "Undoubtedly he would have had to "pay if the Crown had waived its immunity and if he had been "directed to pay by the Board of Trade." It was argued that one cannot waive an immunity unless one is first liable and that this statement of mine is inconsistent with the view that the charging provisions of the Income Tax Acts do not apply at all to Crown income. I must confess that I had thought that if an Act of Parliament imposes a general charge but contains an exception that A.B. shall not be liable to pay that charge, and if A.B. is then asked to pay and, notwithstanding his immunity, agrees to pay the charge, that could properly be described as waiving his immunity. But I am not the best interpreter of what I said. It must stand. I can only say that I do not read anything in that case as supporting the respondent's present argument (which was not submitted in that case). Indeed, I rather think that, if it had been submitted and were right, I should have been able to decide the case the other way. The question was whether the Custodian was liable to pay when he paid the tax. If the true view were that the Acts apply to Crown income unless and until the prerogative is invoked, then it would seem to me that the Crown or its servants must be liable under the Acts unless and until the prerogative is invoked. In the *Bank voor Handel* case [10] the prerogative was not invoked before payment and payment was made, in this view, under the Act. That seems to me to be very like paying what the Custodian was then liable to pay.

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[6] 9 App.Cas. 61, 77.

[7] [1940] 1 K.B. 427, 439; 56 T.L.R. 286; [1940] 1 All E.R. 32.

[8] [1954] A.C. 584; [1954] 1 All E.R. 969.

[9] [1954] A.C. 584, 624–5.

It is true that a variation of the respondent's argument was submitted to the effect that although an Act applies to the Crown, the prerogative comes into play automatically to prevent the Act from operating and, if the Crown wishes the Act to operate in a particular case on its property, it must for that case waive its privilege. At least that appeared to be the argument, but I found it too subtle to grasp easily. It seems to me to be indistinguishable from saying that the Act does not apply to the Crown but that in a particular case the Crown may waive its immunity in the sense of agreeing in that case to pay as if the Act did apply to it.

In my opinion, the real question is what the proper construction is of the statutory provision, taking into account the royal prerogative, and I now turn to the appellants' argument. They say that inherently the Crown is not a taxable person and, therefore, in a taxing Act, "person" must as a matter of construction always mean a person other than the Crown. I think that that is much too widely stated. I agree that the question is one of construction, but the Act may state expressly that some one of its provisions does bind the Crown, and then the Crown will be bound by that provision, though not by others. In the Income Tax Act, 1918, there is a provision of this kind. A tenant who pays tax under Schedule A can deduct tax from his rent when he pays it to his landlord. If his landlord is the Crown he is liable to pay tax as in other cases, but in the absence of special provision he could not deduct tax in paying his rent because that would be prejudicing the Crown by interpreting the provision which allows deduction as binding the Crown. But No. VIII, rule 1, of the Rules applicable to Schedule A expressly provides that "any receiver on behalf of the Crown or other "person receiving the rent shall . . . allow the deduction on "receipt of the residue of the rent."

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[10] [1954] A.C. 584.

If an Act contains a general provision and an express exception, then the scope of the general provision is limited by the exception. In the same way it appears to me that a general taxing provision must be construed in light of what Lord Blackburn called the "implied exemption on the ground of "prerogative." A charging provision, which, on the face of it, would or could result in imposing a charge on the Crown, must be held inapplicable to the Crown unless the Crown is bound expressly or by necessary implication, and if the result of reading the word "person" in rule 11 (2) as including the Crown would be to make the Crown chargeable to tax, then it could not be so read.

But at this point I part company with the appellants' argument. Rule 11 (2) is not a charging provision. It does not say that the person succeeding to a trade shall pay tax. For example, let me suppose that, instead of being bought by the Crown, the appellants' undertaking had been bought by an Indian company which had no connexion with this country. It is admitted, and rightly, that the company would have been a person succeeding to the trade of the appellants within the meaning of rule 11 (2), but that company would not have been taxable under rule 11 (2), or any other provision of the Act. In effect, what rule 11 (2) provides is only this: if the person succeeding to the trade is taxable in this country, his tax shall be computed in a certain way. And there is nothing to exclude the application of the rule to the seller if it so happens that the purchaser is not liable to pay tax; whether or not the purchaser is taxable, the tax payable by the person who sold the business is to be computed as if the business had been discontinued at the time of the sale.

The appellants found on a passage in the speech of Lord Macmillan in *Income Tax Commissioners for City of London* v. *Gibbs*,[11] where he says: "The important thing to ascertain is "the meaning of the word 'person' in the vocabulary of the "Income Tax Acts. The word constantly occurs throughout the "Acts, and I think it is most generally used to denote what may "be termed an entity of assessment, i.e., the possessor or "recipient of an income which the Acts require to be separately "assessed for tax purposes." Lord Macmillan does not say that the word is always used in this sense, and I do not think that it is used in this sense in rule 11 (2). If an Indian company, not taxable in this country, had bought the appellants' undertaking it would have been a person within the meaning of this rule. But it would not have been an entity of assessment in the sense that the Acts would require its income to be assessed for tax purposes.

So the reason which requires the scope of charging provisions to be limited so as not to include the Crown does not apply to rule 11 (2). But the appellants say that, even if this rule is not in itself a charging provision, it is so closely connected with the charging provisions in the Act that the word "person" must have the same meaning here as in those other provisions, where it does not include the Crown. I do not agree with that. No doubt there is a presumption that the same word preserves the same meaning in closely related sections, but there are numerous cases where that presumption has had to give way to other considerations and, in my opinion, it cannot prevail in this case. To apply it would produce an entirely unreasonable result. There is no reason why the amount of tax payable by the seller of a business should depend on the tax liability of the purchaser, and there is nothing in this rule or in any other part of the Act to indicate any intention that it should.

I am therefore of opinion that this appeal should be dismissed.

Lord Tucker. My Lords, I am not persuaded that the decision of this appeal calls for an historical investigation of the true nature of the royal prerogative or its precise impact upon parliamentary legislation.

It is beyond dispute that the Income Tax Acts do not operate to charge the Crown with payment of tax—in other words, the immunity derived from the prerogative has not been affected by express words or by necessary implication.

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[11] [1942] A.C. 402, 419; [1942] 1 All E.R. 415.

This being the position, I can see no reason why the word "person" in those parts of the Acts which do not impose a charge to tax should be construed otherwise than in its ordinary and natural meaning, which clearly includes the Crown.

Rule 11 (2) does not prescribe what persons shall be chargeable to tax. It deals with the computation of tax payable by taxable persons in a certain event, viz., when a succession to a trade takes place. It is quite immaterial to the computation of the tax payable by the person who previously carried on the trade whether the successor is or is not a taxable person. Similarly, it is immaterial to the computation of tax payable by the successor whether the previous trader was taxable. It is in this context that the words "if any person succeeds to any trade" occur. This is the natural way to describe a trade succession—an event upon the happening of which a computation of the tax payable by taxable persons is to be made.

My Lords, this appears to me to be the natural and reasonable construction of rule 11 (2), whatever may be the correct approach to the construction of the word "person" in paragraph 1 of Schedule D, which is the charging provision.

I would accordingly dismiss the appeal.

Lord Keith of Avonholm. My Lords, it is not in dispute that the appellants' undertaking was sold to the Crown on August 29, 1947. It is also not in dispute that the validity of the assessment made on the appellants (whom I shall call "the "company") for the year 1947–48, being the company's last year of trading, depends on what is the "basis period" for that year of assessment, as defined by section 57 of the Income Tax Act, 1945. The company says it is its trading year 1946, for which its accounts were made up. The Revenue say it is the year of assessment, viz., 1947–48. The importance of the question lies in the fact that the balancing charge which falls to be made on the company under section 17 of the Income Tax Act, 1945, in respect of the sale of its machinery and plant, arises in the year 1947–48, and unless that year is its "basis period" for the purpose of the assessment the balancing charge cannot be brought into computation for the purpose of estimating the profits of the company liable to tax.

The determination of this question depends on whether rule 11 (2) of the Rules applicable to Cases I and II of Schedule D to the Income Tax Act, 1918, introduced by section 32 of the Finance Act, 1926, applies to the company or not. Again, it is agreed that if rule 11 (2) applies to the company the present appeal fails; if it does not apply the appeal succeeds. For convenience I quote the rule in question. [His Lordship read the paragraph, and continued:] In seeking to exclude the application of this rule, Mr. Millard Tucker relied on two submissions: first, that "person" in rule 11 (2) has the same meaning as under the charging provision of Schedule D, which taxes the annual profits or gains arising or accruing to any person, etc.; and, secondly, that under the charging provision "any person" means any person other than the Crown.

For the second of these submissions reliance was placed on the royal prerogative as introducing a principle of construction into legislation which limited the meaning of words so as not to affect the Crown. For the Revenue, on the other hand, it was contended that the prerogative operated to give an exemption, or privilege, to the Crown to say that, though general words in a statute were capable of including the Crown, the Crown had the prerogative to claim exemption, or to say that it was not bound by the Act. Thus, while it was common ground that the prerogative operated to prevent the Crown being taxed under the statute, the dispute was as to how it did it.

Much authority was cited on this matter. But as, in my opinion, none of the cases was directed to the aspect of the matter raised by this appeal, I do not find them very helpful. In *Mersey Docks and Harbour Board Trustees* v. *Cameron* [12] references are made by the consulted judges and by their Lordships of this House, in almost identical terms, to the rule that the Crown not being named in a statute is not bound by it. But in *Coomber* v. *Berkshire Justices* [13] the emphasis is laid on the exemption by virtue of the prerogative. Lord Watson states the matter thus [14]: "The exemption of the Crown from the incidence of rating "statutes is a general privilege, and is nowise dependent upon "the local or imperial character of the rate. It takes effect in "all cases when the Crown is not named in the statute, or, I "should prefer to say, in all cases where the enactments do not "take away the privilege, either in express terms or by plain "and necessary implication." The matter will be found similarly expressed by Day J. and Wills J. in *Gorton Local Board* v. *Prison Commissioners (1887)*,[15] and Lord du Parcq in *Bombay Province* v. *Bombay Municipal Corporation.*[16] In Bacon's Abridgment (I quote from the 7th edition, vol. 6, p. 462) it is said: "But "where a statute is general, and thereby any prerogative, right, "title, or interest is devested or taken from the King, in such "case the King shall not be bound, unless the statute is made by "express words to extend to him"; and again at p. 463, ". . . in "a variety of cases we find it determined, that general words in an "Act shall not oust the King of his prerogative." The authority most favourable to the appellants' contention would seem to be the following passage from Alderson B. in *Attorney-General* v. *Donaldson*[17]: "It is a well-established rule, generally speaking, "in the construction of Acts of Parliament, that the King is not "included unless there be words to that effect; for it is inferred "prima facie that the law made by the Crown, with the assent "of Lords and Commons, is made for subjects and not for the "Crown." That passage, based on Plowden, has not escaped criticism from more modern authority.

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[12] (1865) 11 H.L.C. 443.

[13] 9 App.Cas. 61.

[14] Ibid. 76.

[15] [1904] 2 K.B. 165n.

[16] [1947] A.C. 58; 62 T.L.R. 643.

The contention for the company seems indistinguishable from the proposition that it is a principle of statutory construction that words used do not include the Crown, or Crown property, unless the contrary is expressed, or clearly implied. But, if so, no question of the prerogative arises. The matter is just a rule of statutory construction that calls for no invocation of the prerogative. If so, all the previous decisions are unexplained in their reference to and reliance on the prerogative. The true explanation, easily understandable on historical and legal grounds, is that words in a statute capable of applying to the Crown may be overridden by the exercise of the prerogative. That is necessarily involved in the oft-repeated phrase that the King is not bound by a statute unless by express words or by clear implication. If the statute does not apply to him there can be no question of his being bound by it. It is only because it can apply to him that appeal to the prerogative is necessary. The conception of the prerogative, in my view, is of something that stands outside the statute, on which the Crown can rely, to control the operation of the statute so far as it prejudices the Crown. This, in my opinion, is implicit in all the decisions and works of commentators on the subject and underlies the observations of most of their Lordships in this House who delivered speeches in *Bank voor Handel en Scheepvaart N.V.* v. *Administrator of Hungarian Property*.[18] If, then, it had been necessary my opinion would, I think, have been adverse to the

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[17] (1842) 10 M. & W. 117, 123–4.

[18] [1954] A.C. 584.

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MADRAS ELECTRIC SUPPLY CORPORATION LD. *v.* BOARLAND.

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contention for the company. But I find a more limited ground of decision in the language of rule 11 (2) itself.

Rule 11 (2) is a rule designed with other rules to set up the basis of assessment on which the taxpayer will be taxed. As ex hypothesi the Crown escapes taxation under the charging provision, the Crown is not affected directly by rule 11 (2). But the Crown is bound by the assessment and other provisions of the statute which fix the basis of taxation. The tax is levied for the benefit of the Crown and can only be raised by statute, and the Crown must recognize the conditions on which Parliament says it shall be levied. Whatever the word "person" means in the charging provision, it does not necessarily follow that it means the same thing in rule 11 (2). If in rule 11 "person" meant person other than the Crown, the whole basis of assessment in the case of a particular class of taxpayer, namely, purchasers from or sellers to the Crown, would be disrupted. A different basis of assessment would exist for persons who had bought or sold businesses according as they bought from or sold to the Crown, or persons other than the Crown. No reason for any such distinction was, or can be, suggested. The rule is, in my opinion, intended merely to deal with the situation that arises on a purchase or sale of a business, and to give the rule a reasonable and intelligible meaning "person" must, if possible, be given a meaning that will include the Crown. There is nothing in the Act to exclude such a reading and it is supported also by the definition of "person" in the Interpretation Act, 1889 (s. 2 (1)).

I would dismiss the appeal.

Appeal dismissed.

Solicitors: *Sanderson, Lee, Morgan, Price & Co.; Solicitor of Inland Revenue.*

[HOUSE OF LORDS.]

H. L. (E.)*

1955
Mar. 28, 29, 30, 31;
May 5.

KIRKNESS (INSPECTOR OF TAXES) . . APPELLANT;

AND

JOHN HUDSON & CO. LD. . . . . RESPONDENT.

Revenue—Income tax—Balancing charge—Railway wagons vested in Transport Commission — Compensation — Whether transaction a sale—Liability to balancing charge—Income Tax Act, 1945 (8 *&* 9 *Geo.* 6, *c.* 32), *s.* 17 (1) (*a*), (3)—*Transport Act,* 1947 (10 *&* 11 *Geo.* 6, *c.* 49), *s.* 29.

Transport—Nationalization—Compensation. "Sale." "Compulsory "purchase"—Meaning. Statute—Interpretation—Ambiguity.

The vesting of a company's railway wagons in the Transport Commission under section 29 of the Transport Act, 1947, with compensation fixed in the form of transport stock under the relevant sections of that Act, does not constitute a sale for the purposes of section 17 of the Income Tax Act, 1945, so as to render the company liable to a balancing charge under that section. The transaction is not a compulsory sale by analogy with compulsory acquisition of land, since the provisions of the Transport Act relating to the transfer of wagons differ from the procedure for such acquisitions. The ordinary meaning of the word "sale," importing a consensual relation, is to be attributed to the use of it in the context of section 17 (1) (*a*) of the Act of 1945. Since there is no ambiguity in the section, it is not permissible to seek guidance in its construction from later Finance Acts, although it is directed by Parliament to be construed as one with them.

So *held per* Viscount Simonds, Lord Reid, Lord Tucker and Lord Somervell of Harrow; Lord Morton of Henryton dissenting.

Newcastle Breweries Ld. v. *Inland Revenue Commissioners* (1927) 96 L.J.K.B. 735; 43 T.L.R. 476 distinguished.

Ormond Investment Co. Ld. v. *Betts* [1928] A.C. 143 considered.

Per Viscount Simonds. A difference of judicial opinion as to the meaning of words does not in itself establish that they are ambiguous.

Decision of the Court of Appeal (sub nom. *John Hudson & Co. Ld.* v. *Kirkness* [1954] 1 W.L.R. 40; [1954] 1 All E.R. 29) affirmed.

APPEAL from the Court of Appeal (Singleton, Birkett and Hodson L.JJ.).

This was an appeal from an order of the Court of Appeal dated December 2, 1953, dismissing an appeal by the appellant, Eric Arthur Kirkness (Inspector of Taxes), from an order of the Chancery Division of the High Court of Justice (Upjohn J.) dated

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* *Present*: VISCOUNT SIMONDS, LORD MORTON OF HENRYTON, LORD REID, LORD TUCKER and LORD SOMERVELL OF HARROW.

April 29, 1953, whereby an appeal by the respondent company, John Hudson & Co. Ld., on a case stated by the Commissioners for the Special Purposes of the Income Tax Acts was allowed and their determination was reversed.

At all material times the respondent company's business was that of a coal merchant. It had a number of subsidiary companies which also carried on business as coal merchants. The company owned a large number of railway wagons which were used for the transport of the coal in which the company and its subsidiary companies were dealing. On January 1, 1948, it owned 663 such wagons under requisition to the Minister of Transport under the powers contained in regulation 53 of the Defence (General) Regulations, 1939. On that date the property in the wagons was transferred to and vested in the British Transport Commission under section 29 of the Transport Act, 1947. In due course the company received an amount of compensation determined in accordance with the provisions of section 30 and Schedule VI which was satisfied by the issue of an equivalent amount of British Transport Stock. This amount was substantially higher than the written-down value of the wagons for the purposes of the income tax allowances in respect of wear and tear as appearing in the company's books. On these facts a balancing charge of £29,021 was made on the company in pursuance of section 17 of the Income Tax Act, 1945, by an assessment made under Case I of Schedule D to the Income Tax Act, 1918. The amount (except for a part about which no dispute arose) represented the excess of the original cost over the written-down value.

The company appealed against the balancing charge to the Commissioners for the Special Purposes of the Income Tax Acts, who determined the question in favour of the Crown. Upjohn J. reversed their determination. The Court of Appeal upheld his decision. The Crown appealed to the House of Lords.

Sir Reginald Manningham-Buller Q.C., A.-G., C. L. King Q.C. and *Sir Reginald Hills* for the Crown. The balancing charge was rightly made on the company in respect of the transfer of the ownership of its wagons under section 29 of the Transport Act, 1947. In law the result of a sale is a transfer of property from A to B for a consideration in money or money's worth. That exactly corresponds to the effect of the Act on the wagons. The word "sale" can have a wider meaning than a contract and a conveyance of property. In its ordinary and correct meaning it does not involve any contract; it is just the transfer of the property in or ownership of something from A to B for a money price. It is equally appropriate whether the transfer be voluntary or effected by operation of law. So, too, the word " price " is equally appropriate however the sum payable to the former owner is determined. The property is just as much " sold " whether the sale be voluntary or compulsory.

Definitions of " sale " are found in various textbooks, e.g., Benjamin on Sale, 2nd ed., p. 1 (the last edition prepared by the author). This has been relied on by the company but misinterpreted. The material part of his definition is " a transfer of the " absolute or general property in a thing for a price in money." The author was only purporting to deal with a sale which was of a contractual nature, as shown by the marginal note " the " elements of the contract."

One must distinguish between the contract which leads to a sale as distinct from the sale itself. So long as the proper description of the transaction comes within the meaning of " sale " it does not matter whether it was preceded by an express contract or an implied contract or occurs by reason of the provisions of an Act of Parliament. See also Halsbury's Laws of England, 2nd ed., vol. XXIX, p. 5; Blackstone's Commentaries, 19th ed. (1836), vol. II, p. 446, and Chalmers' Sale of Goods, 11th ed., p. 161. These support the proposition that a compulsory as well as a voluntary sale is covered by the term, since the definitions do not refer to the element of mutual assent. From Benjamin's definition one may deduce the distinction between the bargain which is the mutual assent and the transfer which is the actual sale.

The Lands Clauses Consolidation Act, 1845, and other Acts give various bodies and authorities powers of compulsory acquisition, which is generally referred to as compulsory purchase. If there is compulsory purchase, there must be compulsory sale. This is what is authorized by the Act of 1947. In relation to the meaning of " sale " in the Income Tax Act, 1945, one would describe the wagons as having been sold to the commission compulsorily.

Consent is not always necessary before a transaction can be called a sale. There are three classes of sale: (1) a sale preceded by a bargain; (2) a sale following the exercise of compulsory powers where the assent of one party is dispensed with, and (3) a sale where Parliament incorporates a contract of sale in a statute. Every transfer of property at a price is a sale.

Later Acts of Parliament have proceeded on the view that the interpretation of the relevant section is as the Crown contends. This is relied on: see *Camille and Henry Dreyfus Foundation Inc.* v. *Inland Revenue Commissioners.*[1] Guidance is to be obtained from the provisions of the Acts relating to income tax which form a statutory code. In them the legislature is shown to have treated a transfer of property by operation of law to a public body as being a sale for the purpose both of a claim by a taxpayer to a balancing allowance and of his liability to a balancing charge. The Income Tax Act, 1945, the Finance Act, 1947, and the Finance Act, 1948, are all to be construed as one, forming a statutory code, and from them it appears that the word " sold " in section 17 of the Act of 1945 is not confined to sales by mutual consent: see sections 29 and 74 (4) and Schedule VII, paragraph 3, of the Act of 1947, and sections 34, 35 and 82 (4) of the Act of 1948. Parliament can only have thought it necessary to enact paragraph 3 of Schedule VII to the Act of 1947 on the view that " sale " in the Act of 1945 included a compulsory vesting of property in the National Coal Board. The correct rules for interpreting these Acts are stated in the case already cited. The question is not whether the taxpayer has made a taxable profit but whether he is entitled to a balancing allowance or liable to a balancing charge. The provisions provide machinery for adjustment.

The Crown's proposition is supported by *Great Western Railway Co.* v. *Inland Revenue Commissioners*[2] and *John Foster & Sons Ld.* v. *Inland Revenue Commissioners.*[3] See also *Inland Revenue Commissioners* v. *Glasgow and South-Western Railway Co.,*[4] cases under the Stamp Acts.

Cases under the Lands Clauses Acts also support the proposition that mutual consent is not essential to establish a " sale ": see *Regent's Canal Co.* v. *Ware,*[5] *Harding* v. *Metropolitan Railway Co.*[6] and *In re Pigott and Great Western Railway Co.*[7]

The compulsory acquisition cases also support the proposition: see *Inland Revenue Commissioners* v. *Newcastle Breweries Ld.,*[8] *Newcastle Breweries Ld.* v. *Inland Revenue Commissioners*[9] and *Horn* v. *Sunderland Corporation.*[10]

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[1] [1954] Ch. 672, 690, 695–6; [1954] 2 All E.R. 466.

[2] [1894] 1 Q.B. 507; 10 T.L.R. 128.

[3] [1894] 1 Q.B. 516; 10 T.L.R. 152.

[4] (1887) 12 App.Cas. 315, 321.

[5] (1857) 23 Beav. 575, 586.

[6] (1872) L.R. 7 Ch. 154.

[7] (1881) 18 Ch.D. 146.

[8] (1926) 95 L.J.K.B. 936, 939, 941; 42 T.L.R. 609.

[9] (1927) 96 L.J.K.B. 735, 737; 43 T.L.R. 476.

[10] [1941] 2 K.B. 26, 43; 57 T.L.R. 404; [1941] 1 All E.R. 480.

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Another indication favourable to the Crown is in section 58 (3) of the Act of 1945, whereby any reference to the sale of property is to include a reference to exchange.

As to the relation of the Act in question to subsequent Acts, see *In re MacManaway.*[11]

C. L. King Q.C. following. In *Newcastle Breweries Ld.* v. *Inland Revenue Commissioners*[12] it appears from Reason 6 in the printed case for the appellant company on appeal to the House of Lords that it was contended that "the appellants did "not agree to sell nor did they sell to the Admiralty the rum "which was forcibly taken from them."

As to the Lands Clauses Consolidation Act, 1845, the preamble refers to the "acquisition of lands." The words introducing section 6 and the following sections refer to "the purchase of "lands by agreement," and the words introducing section 16 and the following sections refer to "the purchase and taking of lands "otherwise than by agreement." In section 82 there is the description of a landowner as a "seller," and section 92 uses the word "sell."

Under the Income Tax Act, 1945, capital allowances are given in relation to industrial buildings as well as plant and machinery (see section 21). Balancing charges would be made in their case in the event of a compulsory purchase. See also section 8 of the Transport Act, 1947.

Despite what Birkett L.J. said in the Court of Appeal,[13] the Crown is not contending for "a strained and unnatural" meaning of the word "sale" but one in harmony with the Act. This is supported by Schedule VII of the Finance Act, 1947, and sections 5 and 6 of the Coal Industry Nationalization Act, 1946, which uses the words "vest in the Board." The legislature was aware that on the coming into operation of the Act of 1946 the transferors would go out of business. The statutory provisions can only be read on the view that the vesting was a sale: see Schedule VII of the Act of 1947, Part I, paragraph 1, and Part III, paragraph 3. See also sections 34 and 35 of the Finance Act, 1948. All these sections are in line with the Crown's interpretation of section 17 (1) (*a*) of the Income Tax Act, 1945. What is said in Maxwell on the Interpretation of Statutes, 10th ed., p. 33, is a fortiori to such a case as this.

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[11] [1951] A.C. 161; 66 T.L.R. (Pt. 2) 808.

[12] 96 L.J.K.B. 735.

[13] [1954] 1 W.L.R. 40, 55–6; [1954] 1 All E.R. 29.

John Senter Q.C. and *Anthony Barber* for the respondent company. This transaction is not a "sale" within section 17 (1) (*a*) of the Income Tax Act, 1945: see section 58 (3). The use of the word "sale" gives ground for relying on the principle "expressio unius exclusio alterius." The Lands Clauses Consolidation Act, 1845, has no relevance because no provisions similar to those contained in it were included in the Transport Act, 1947, in relation to the transfer of the wagons. The relevant provisions of the Transport Act, 1947, are sections 8, 10, 14 (2) (6), 16, 17 (1) (2) (3), 23, 29, 31, 32, 39, 47 (8), 48 (3), 89 (1) (2), 108 and Schedule VI. Contrast the compensation provisions in Part III with those relating to wagons.

The relevant questions are: Does the word "sale" embrace what is called a compulsory sale? Has such a transaction been made a sale in some special circumstances? The word "sale" may in some circumstances have acquired a wider meaning than its ordinary contractual meaning. But even if the word can be construed as including compulsory purchase under the Act of 1845 that has no bearing on its meaning in relation to the present transaction, since the elaborate machinery provided under that Act resembles that of a sale by consent, in that the owner may be heard as to the amount of the compensation (section 68), whereas under the Act of 1947 the owner is given no such opportunity, the amount of the compensation being regulated solely by section 30 and Schedule VI. This does not constitute a statutory code. Further, under the Act of 1845 there is ultimately a conveyance of the land to the acquiring body, whereas under section 29 of the Act of 1947 the property in the wagons is simply vested in the commission. Even if that vesting constituted a compulsory sale (which it did not) it would not fall within the ambit of the Income Tax Act, 1945. As to compulsory sale under the Act of 1845, see *In re Lord Gerard and London and North Eastern Railway Co.'s Arbitration*[14] and *Errington* v. *Metropolitan District Railway Co.*[15] See also the definition of "vest" in the Finance Act, 1947, Sch. VII, para. 1.

Even if a compulsory purchase order under the Acquisition of Land (Authorized Procedure) Act, 1946, may be called a sale, which is not conceded, the present transaction is still not a sale. The Act may have widened the concept of a sale, but in the case of these wagons none of the machinery of the Act has been adopted and there are here no traces or elements of a sale.

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[14] [1895] 1 Q.B. 459, 464, 466, 469–70, 471; 11 T.L.R. 170.

[15] (1882) 19 Ch.D. 559, 569, 579.

Newcastle Breweries Ld. v. *Inland Revenue Commissioners*[16] is irrelevant because there the primary question at issue was whether a sum received was or was not a trade receipt, and that is not the issue here. Further, what the brewery received in that case was a price and therefore there was a sale.

There is not a sale if there is no mutual assent and here there was in fact no mutual assent, nor was there any provision which in law either imported or dispensed with the need for it.

The legislature could have framed the relevant provisions of the Transport Act so as to constitute the acquisition of the wagons a sale at law, but in fact it did not do so. Alternatively, it could have framed section 17 (1) (*a*) of the Income Tax Act, 1945, so as to comprehend compulsory acquisition as an event giving rise to a balancing charge, as it subsequently did by the Finance Act, 1952, s. 24 and Sch. VI, para. 1, amending section 292 of the Income Tax Act, 1952, which had replaced section 17 (1) (*a*) of the Income Tax Act, 1945. See also section 76 (4) of the Finance Act, 1952. The language of the Transport Act is not apt to describe a sale. As to the meaning of "sale," see Halsbury's Laws of England, 2nd ed., vol. XXIX, p. 5, para. 1, and p. 11, para. 10; Benjamin on Sale, 2nd ed., p. 1; Blackstone's Commentaries, 1st ed., Bk. II, c. 30, p. 446, and Chalmers on Sale of Goods, 12th ed., pp. 9, 166, 167.

The stamp duty cases do not apply to this transaction. They are of no assistance on the construction of section 17 of the Income Tax Act, 1945, which is a charging section and should be construed strictly. In this there is a distinction between a taxing Act and other Revenue Acts such as the Stamp Acts. Compare *Great Western Railway Co.* v. *Inland Revenue Commissioners*,[17] *per* Lopes L.J., with *Potts' Executors* v. *Inland Revenue Commissioners*.[18]

Section 34 of the Finance Act, 1948, has no relation to railway wagons. There is nothing in it or in section 35 in the light of which one would say that there was a sale here. The two sections are retrospective, but they do not help in interpreting the Transport Act, 1947. The "effect" referred to in section 34 (6) is limited to the taxation position in relation to balancing charges as affecting the named nationalized industries. On no view can it be said to operate as an amendment, express or implied, to section 17 of the Act of 1945. Nothing in *Camille and Henry*

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[16] 96 L.J.K.B. 735.

[17] [1894] 1 Q.B. 507, 513.

[18] [1951] A.C. 443, 454; [1951] 1 T.L.R. 152; [1951] 1 All E.R. 76.

Dreyfus Foundation Inc. v. *Inland Revenue Commissioners* [19] affects what was said in *Inland Revenue Commissioners* v. *Dowdall, O'Mahoney & Co. Ld.*[20] See also *Smith's Potato Estates Ld.* v. *Bolland.*[21]

In the first instance the court can only look at the Income Tax Act, 1945, and decide on its wording alone whether or not the words "is sold" in section 17 (1) (*a*) are ambiguous. If they are not ambiguous no attention can be paid to the Acts of 1947 and 1948 despite the statutory direction that they are to be construed as one with the Act of 1945. Only if the words in the Act of 1945 are ambiguous can those Acts be looked at for guidance. There is, however, nothing ambiguous in the words "is sold." The question of their meaning is one which a lawyer might reasonably be expected to answer.

As to the effect of ambiguity in an Act of Parliament, see *Ormond Investment Co. Ld.* v. *Betts* [22]; *Pillai* v. *Mudanayake* [23]; *Attorney-General* v. *Clarkson* [24]; *Cape Brandy Syndicate* v. *Inland Revenue Commissioners* [25]; *In re MacManaway,*[26] and *Lord Howard de Walden* v. *Inland Revenue Commissioners.*[27]

Applying the canons of construction to be deduced from those cases, there is nothing, properly speaking, ambiguous about the use of the word "sold" in the relevant Act. There may be scope for debate as to how far one carries the word, how many transactions are covered, but that is not ambiguity. A word or expression is "ambiguous" when it is capable of two plain meanings. The first part of the word implies the concept of equality. If an author writes a treatise on "sale," that is not ambiguous as to the subject-matter. On the construction of the Act of 1945 the court would have had no difficulty if the point had arisen in 1947: see the definition of "sale moneys" in section 68 (1) of the Income Tax Act, 1945.

The previous history of *Newcastle Breweries Ld.* v. *Inland Revenue Commissioners* [28] is that the Admiralty took possession of the company's rum in pursuance of powers conferred by the Defence of the Realm Regulations. Salter J. held that regulation 2B (*b*) dealing with the "price" to be paid was ultra vires:

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[19] [1954] Ch. 672.

[20] [1952] A.C. 401, 414–5, 423, 426; [1952] 1 T.L.R. 560; [1952] 1 All E.R. 53.

[21] [1948] A.C. 508; 64 T.L.R. 430; [1948] 2 All E.R. 367.

[22] [1927] 2 K.B. 326 (C.A.); [1928] A.C. 143.

[23] [1953] A.C. 514.

[24] [1900] 1 Q.B. 156; 16 T.L.R. 51.

[25] [1921] 2 K.B. 403, 414; 37 T.L.R. 402.

[26] [1951] A.C. 161, 169, 175, 176–7, 178; 66 T.L.R. (Pt. 2) 808.

[27] [1942] 1 K.B. 389, 398.

[28] 96 L.J.K.B. 735.

Newcastle Breweries Ld. v. *Rex.*[29] Subsequently the company made a claim under section 2 of the Indemnity Act, 1920, which referred to "payment or compensation": see *Inland Revenue Commissioners* v. *Newcastle Breweries Ld.*[30] and *Newcastle Breweries Ld.* v. *Inland Revenue Commissioners.*[31]

The questions in this case were properly summarized by Singleton L.J.[32] and correctly answered by him.

Anthony Barber following. As to two apparently contradictory parts of a section, take Schedule VI, paragraph 1 (1) (*a*), of the Finance Act, 1952. The words "ceases to belong" are clear and are not made ambiguous by subsequent otiose words. Similarly in the present case the words "is sold" are clear and not ambiguous although questions may arise whether on the facts of a particular case there has been a sale.

Sir Reginald Manningham-Buller Q.C., A.-G. in reply. The questions set out by Singleton L.J. were not really the proper questions. The matter turns primarily on the construction of the word "sold" in section 17 (1) (*a*) of the Income Tax Act, 1945. As to the meaning of "sale" in relation to the Lands Clauses Consolidation Act, see *In re Burdekin.*[33] A compulsory purchase may be put through with a non-co-operative vendor and yet the word "sale" may be applied to the transaction. From the Sale of Goods Act, 1893, an Act codifying the common law, the only guidance to be obtained as to the meaning of "sale" is in section 1. The definition accords with Blackstone's Commentaries and Halsbury's Laws of England, 2nd ed., vol. XXIX, p. 5, para. 1, where the transaction is said to include an exchange. Paragraph 10 does not help because it is dealing with a contract of sale. Though the word "sale" is commonly and properly applied to voluntary sales, it is also apt to cover a transfer of property where there is no mutual assent. As to the effect of notice to treat, see *Haynes* v. *Haynes.*[34] For the effect on a statute of subsequent legislation *Camille and Henry Dreyfus Foundation Inc.* v. *Inland Revenue Commissioners*[35] is relied on. The Finance Acts, 1947 and 1948, inferentially put on the Income Tax Act, 1945, a construction such as the Crown contends. The word "sale" in section 17 of the Act of 1945 comprehends every kind of sale of goods. A "sale" is a transfer of property from A to B for any consideration called a price. Transfer and a money consideration is provided for in the Transport Act, 1947. Therefore the appeal should be allowed because this transaction comes within section 17 (1) (*a*). Even if it does not come within the terms of the section so clearly that there is no ambiguity, the later enactments, to which the court may have regard, bring it within the section.

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[29] [1920] 1 K.B. 854; 36 T.L.R. 276.

[30] (1925) 134 L.T. 506, 509–10.

[31] 96 L.J.K.B. 735, 736.

[32] [1954] 1 W.L.R. 40, 46.

[33] [1895] 2 Ch. 136, 146.

[34] (1861) 1 Dr. & Sm. 426.

[35] [1954] Ch. 672, 695–6.

Their Lordships took time for consideration.

May 5. VISCOUNT SIMONDS. My Lords, this appeal raises questions of some difficulty in regard to the meaning and effect of section 17 of the Income Tax Act, 1945. The material parts of that section are as follows: " (1) Subject to the provisions of " this section, where, on or after the appointed day, any of the " following events occurs in the case of any machinery or plant " in respect of which an initial allowance or a deduction under " Rule 6 of the Rules applicable to Cases I and II of Schedule " D has been made or allowed for any year of assessment to a " person carrying on a trade, that is to say, either—(*a*) the " machinery or plant is sold, whether while still in use or not; or " (*b*) the machinery or plant, whether still in use or not, ceases " to belong to the person carrying on the trade by reason of the " coming to an end of a foreign concession; or (*c*) the machinery " or plant is destroyed; or (*d*) the machinery or plant is put out " of use as being worn out or obsolete or otherwise useless or no " longer required, and the event in question occurs before the " trade is permanently discontinued, an allowance or charge (in " this Part of this Act referred to as ' a balancing allowance ' or " ' a balancing charge ') shall, in the circumstances mentioned in " this section, be made to, or, as the case may be, on, that person " for the year of assessment in his basis period for which that " event occurs: . . . (2) Where there are no sale, insurance, salvage " or compensation moneys or where the amount of the capital " expenditure of the person in question on the provision of the " plant or machinery still unallowed as at the time of the event " exceeds those moneys, a balancing allowance shall be made, " and the amount thereof shall be the amount of the expenditure " still unallowed as aforesaid, or, as the case may be, of the " excess thereof over the said moneys. (3) If the sale, insurance, " salvage or compensation moneys exceed the amount, if any, of " the said expenditure still unallowed as at the time of the " event, a balancing charge shall be made, and the amount on " which it is made shall be an amount equal to the excess or, "where the said amount still unallowed is nil, to the said "moneys: . . ." It will be observed that in subsection (1) (*a*) occur the words "is sold," and it is around these two plain English words that a controversy arose between the Crown and the respondents which occupied your Lordships for several days.

The relevant facts are simple and few. At all material times the business of the respondents was that of coal merchants and they owned a large number of wagons which they used for the transport of coal. These wagons were on January 1, 1948, under requisition by the Minister of Transport under the powers contained in regulation 53 of the Defence (General) Regulations, 1939.

On January 1, 1948, the property in these wagons was vested in the British Transport Commission by virtue of section 29 of the Transport Act, 1947, which is in the following terms: "Where, immediately before the date of transfer, any privately "owned railway wagon is under requisition by virtue of an "exercise of the powers in that behalf conferred by Regulation 53 "of the Defence (General) Regulations, 1939—(*a*) the property in "that wagon shall vest in the Commission on the date of transfer, "free from any mortgage or other like incumbrance, and the "requisition shall then cease; . . ." Compensation to the owner of wagons who has been thus deprived of them is provided by section 30, which enacts by subsection (1) that subject to the provisions of the three next succeeding subsections the Commission shall pay to him as compensation in respect thereof an amount determined by reference to the type of wagon and the year in which it was first built in accordance with the table set out in Schedule VI to the Act. The three succeeding subsections provide for certain variants of the amount of compensation, but, broadly speaking, it is a sum determined by age and type without reference to the condition of repair. The amount so determined, if it exceeded the sum of £2,000, was not to be paid in currency but was to be satisfied by the issue of British Transport Stock.

It is perhaps worth noting that the expression "the date of "transfer" refers back to section 12 of the Act, which provides for the vesting in the Commission of the undertakings specified in Schedule III on January 1, 1948, and refers to that date as the date of transfer. "Transfer" is apparently adopted as a convenient word for describing a statutory operation by which the property of A is vested in B.

Pursuant to section 29 of the Act, the respondent company's wagons were duly vested in the Commission, and in due course the company received an amount of compensation determined in accordance with the provisions of section 30 and Schedule VI which was satisfied by the issue of an equivalent amount of British Transport Stock. This amount was substantially higher than the written down value of the wagons for the purposes of the income tax allowances in respect of wear and tear as appearing in the company's books. On these facts a balancing charge of £29,021 was made on the company in pursuance of section 17 of the Income Tax Act, 1945, which I have already set out, by an assessment for the year 1948/49 made under Case I of Schedule D of the Income Tax Act, 1918. This amount (except for a part about which no dispute arises) represents the excess of the original cost over the written-down value.

The respondent company appealed against the balancing charge to the Commissioners for the Special Purposes of the Income Tax Acts, who determined the question in favour of the Crown and at the request of the company stated a case for the opinion of the High Court. The case was duly heard by Upjohn J., who reversed the determination of the commissioners, holding that no balancing charge was payable, and his decision was upheld by the unanimous opinion of the Court of Appeal. Your Lordships are now invited to reverse their judgment.

My Lords, I must at a later stage call your Lordships' attention to an argument which is founded on the provisions of certain later Acts, but our primary task is to consider whether the statutory transaction which I have described was an event to which section 17 (1) (*a*) of the Income Tax Act, 1945, applied, or, in other words, whether the respondent company's wagons were " sold " within the meaning of that section. Let me say at once that there is nothing in the Act itself to give any special meaning or colour to that word: it may be that the policy of the Act might equally well be applied to other transactions which are in some respects analogous to sales, but that is guess work and we are here concerned with sales, not with analogous transactions.

My Lords, in my opinion the company's wagons were not sold, and it would be a grave misuse of language to say that they were sold. To say of a man who has had his property taken from him against his will and been awarded compensation in the settlement of which he has had no voice, to say of such a man that he has sold his property appears to me to be as far from the truth as to say of a man who has been deprived of his property without compensation that he has given it away. Alike in the ordinary use of language and in its legal concept a sale connotes the mutual assent of two parties. So far as the ordinary use of language is concerned it is difficult to avoid being dogmatic, but for my part I can only echo what Singleton L.J. said in his admirably clear judgment[1]: "What would anyone accustomed to the use of "the words 'sale' or 'sold' answer? It seems to me that "everyone must say 'Hudsons did not sell.'" I am content to march in step with everyone and say "Hudsons did not sell." Nor is a different result reached by an attempt to analyse the legal concept. When Benjamin said in the passage quoted by Singleton and Birkett L.JJ. from his well-known book on Sale, 2nd ed., p. 1, that "by the common law a sale of personal "property was usually termed a 'bargain and sale of goods,'" he was by the use of the word "bargain" perhaps unconsciously emphasizing that the consensual relation which the word "bargain" imports is a necessary element in the concept. In this there is nothing new: the same principle is exhibited in the Roman law, for the opening words of Title 23 of the third book of the Institutes of Justinian "De emptione et venditione" are "emptio et venditio contrahitur, simulatque de pretio con-"venerit." I underline the word "contrahitur" and point out that it may have more than academic interest since the Income Tax Act, 1945, is a United Kingdom Act and "sale" must be construed by reference to the law of Scotland as well as the law of England. Sometimes the contract for sale is itself the sale, as so often in the sale of goods: sometimes, and particularly in the sale of land, it is regarded as a part of the sale as, for example, when it is said by a modern writer that "the first step "in the sale of land is the contract for sale" (see Cheshire, Modern Real Property, 7th ed., p. 631). But it is immaterial whether the contract is regarded as the sale itself, or as a part of, or a step in, the sale or as a prelude to the sale: there is for the present purpose no substance in any such distinction. The core of it is that the consensual relation is connoted by the simple word "sale."

It was urged upon your Lordships that, after all, the result in law of a sale is to transfer the ownership of property from A to B for a consideration in money or money's worth, and that this is just what the Transport Act does to the respondent company's wagons. But, my Lords, if I may say so without disrespect to the very able and helpful argument of the Attorney-General, I find it in this aspect dangerously near a logical fallacy. A dog is an animal that has four legs and a tail, but not every animal that has four legs and a tail is a dog. Nor is a statutory vesting of A's property in B and the award of compensation to A a sale, though its result may be the same as if A had sold that property to B.

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[1] [1954] 1 W.L.R. 40, 46; [1954] 1 All E.R. 29.

Reference was next made to procedure under the Lands Clauses Consolidation Act, 1845, and to general or special Acts which give to undertakers or to central or local authorities powers of compulsory acquisition, and it is true enough that these powers are commonly referred to as powers of compulsory purchase, and the transaction is sometimes referred to as a compulsory sale. Faced with this nomenclature, which has been used for 100 years or more, the respondent company did not admit that, even if the transfer of their property had been effected by the usual procedure of compulsory purchase, which is now generally standardized by the Acquisition of Land (Authorization Procedure) Act, 1946, the transaction would be a sale within section 17 (1) (*a*) of the Income Tax Act, 1945. I do not think that it is necessary to determine this question. There are aspects of a so-called compulsory sale which clearly distinguish it from a sale stricto sensu, and I am not satisfied that without some context to aid it the word " sale " in an Act of Parliament should be held to include a transaction which is more accurately, and, I think, now more commonly, described as a compulsory acquisition. But, however this may be, the operation of the Transport Act is widely different from that of the Acts to which I have referred. It has not those elements which in some degree assimilate a compulsory sale to a sale simpliciter and make the name, if a misnomer, at least a convenient misnomer. It was easy to describe as a purchase or sale with the qualifying adjective " compulsory," a transaction in which the parties were placed in a position to negotiate and, apart from the power of compulsion in the background, were not unlike an ordinary vendor and purchaser. These elements, as I say, are wholly lacking in the transaction under review and it is, in my opinion, an illegitimate use of language to say that because an acquisition under the procedure of the Lands Clauses Act is spoken of as a compulsory sale, therefore this transaction is a sale.

Reliance was placed by counsel for the Crown upon the case of *Newcastle Breweries Ld.* v. *Inland Revenue Commissioners.*[2] The facts of that case are sufficiently set out in the judgment of Singleton L.J., and I do not think it necessary to repeat them. Nor do I differ in any respect from the view which he and Birkett L.J. formed upon its relevance. The question there was whether a sum awarded to the company by way of compensation for a quantity of rum requisitioned by the Admiralty was a profit arising from its trade or business. The company contended that it was not. It was held by Rowlatt J. and the Court of Appeal and this House that it was. Rowlatt J., in the course of his judgment referring to the transaction, said [3]: "Now what is that except a compulsory sale of the rum?" and somewhat similar expressions were used in this House. But they were used alio intuitu and are no authority for saying that every compulsory acquisition, however effected, is a sale.

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[2] (1927) 96 L.J.K.B. 735; 43 T.L.R. 476.

Nor, my Lords, do I get any assistance in the construction of this Act from the numerous cases decided under the Stamp Acts to which we were referred. In one of them (*John Foster & Sons Ld.* v. *Inland Revenue Commissioners* [4]) upon which the appellant chiefly relied, Lindley L.J. used language which, taken out of its context, would support the view that any transfer of A's property to B for a consideration in money or money's worth could be regarded as a sale. And in *Great Western Railway Co.* v. *Inland Revenue Commissioners* [5] similar language was used by Lord Esher M.R. But, assuming, as I do, that these cases were rightly decided for the purpose of determining what sort of instrument is a "conveyance on sale" within the meaning of the Stamp Act, 1891, I must repeat that in them no more than in the *Newcastle Breweries* case [6] do I find authority to support the appellant's wide proposition in the present case.

At an early stage in this opinion I indicated that I would have to refer to an argument founded on the provisions of later Acts. Two questions here arise: (1) whether it is legitimate to seek guidance from the later Acts in construing the earlier one, and (2) if it is, what light the later Acts throw upon the earlier one.

I must preface my consideration of these questions by a reference to the case of *Ormond Investment Co. Ld.* v. *Betts*, [7] for at more than one point it is a direct authority upon the questions we have to decide. In the first place, I will quote a passage from Lord Buckmaster's speech. [8] He cites the following words from the judgment of Lord Sterndale in *Cape Brandy Syndicate* v. *Inland Revenue Commissioners* [9]: " I think it is " clearly established in *Attorney-General* v. *Clarkson* [10] that sub- " sequent legislation on the same subject may be looked to in " order to see what is the proper construction to be put upon an " earlier Act where that earlier Act is ambiguous. I quite agree " that subsequent legislation, if it proceed upon an erroneous con- " struction of previous legislation, cannot alter that previous " legislation; but if there be any ambiguity in the earlier legisla- " tion, then the subsequent legislation may fix the proper " interpretation which is to be put upon the earlier." " This " says Lord Buckmaster, " is, in my opinion, an accurate expres- " sion of the law, if by ' any ambiguity ' is meant a phrase fairly " and equally open to divers meanings, but in this case the " difficulty is not due to ambiguity but to the application of rules " suitable for one purpose to another for which they are wholly " unfit." Other noble and learned Lords expressed the same opinion. Here, then, is the first proposition, that it is only where there is an ambiguity in the earlier Act that recourse may be had to a later Act for its construction. What, then, is an ambiguity for this purpose? The *Ormond* case [11] here, too, gives valuable help, not only in the exposition given by Lord Buckmaster but also by its own example. The facts, which I extract from the head-note to the report, were these. By rule 1 of Case V of Schedule D of the Income Tax Act, 1918, the tax in respect of income arising from foreign stocks and shares fell to be computed on the full amount thereof on the average of three preceding years as directed in Case I. The rule applicable to Case I, which dealt with trades, prescribed how the tax should be computed. But in addition to rules under Case I there were rules applicable to Cases I and II of which rule 1 (2) prescribed the method of computation in certain cases. The Ormond Investment Co. Ld. was assessed to tax on the basis that the words in rule 1 of Case V " as directed in " Case I " referred to rule 1 (2) of the rules applicable to Cases I and II as well as to the rule applicable to Case I. This assessment was supported by the Crown both on the ground that this was what the relevant words in the Act of 1918 by themselves meant, and on the further ground that a consideration of the provisions of a later Act, viz., section 26 of the Finance Act, 1924, showed that this was the meaning attributed by the legislature to the words of the earlier Act. In this case Lord Buckmaster was of opinion, as had been at least one of the members of the Court of Appeal, that the first contention of the Crown was right, and that the words of the earlier Act had the meaning they sought to put upon them. The other noble and learned Lords thought otherwise. It would have been easy then to say that, since judicial opinion differed as to the meaning of these words, there was such an ambiguity as to justify recourse to a later Act to resolve it. But the decision of this House was unanimously to the contrary. That means that each one of us has the task of deciding what the relevant words mean. In coming to that decision he will necessarily give great weight to the opinion of others, but if at the end of the day he forms his own clear judgment and does not think that the words are " fairly and equally " open to divers meanings " he is not entitled to say that there is an ambiguity. For him at least there is no ambiguity and on that basis he must decide the case. So here, for me the meaning of section 17 of the Income Tax Act, 1945, is clear beyond a peradventure, and I cannot look to later Acts for its meaning and effect.

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[3] (1925) 134 L.T. 506, 510.

[4] [1894] 1 Q.B. 516; 10 T.L.R. 152.

[5] [1894] 1 Q.B. 507; 10 T.L.R. 128.

[6] 96 L.J.K.B. 735.

[7] [1928] A.C. 143.

[8] Ibid. 156.

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[9] [1921] 2 K.B. 403, 414; 37 T.L.R. 402.

[10] [1900] 1 Q.B. 156; 16 T.L.R. 51.

[11] [1928] A.C. 143.

My Lords, upon another point the *Ormond* case[11] is an important authority. For in the present case much stress was laid on the fact that the later Acts to which it is sought to refer are by their terms to be construed as one with the earlier Act. This is indeed a common feature of revenue legislation, and it was present and by no means forgotten in the *Ormond* case.[11] For I find in the argument of the then Attorney-General the following passage[12]: " The Act of 1924 is to be read with the Act of 1918, " and the new rule provided by section 26 of the later Act is to be " regarded as another provision of the principal Act." And in the speech of Lord Buckmaster from a passage, the whole of which is a valuable exposition of the law of this subject, I cite these words[13]: " It is also possible that where Acts are to be " read together, as they are in this case, a provision in an earlier " Act that was so ambiguous that it was open to two perfectly " clear and plain constructions could, by a subsequent incorporated statute, be interpreted so as to make the second statute " effectual." " As they are in this case " are, for my present purpose, the material words in this passage, for they show, as the argument for the Crown has shown, that in the *Ormond* case,[14] as in the present case, the House was dealing with two or more statutes which were to be read together or construed as one, and it was to those conditions that it directed its decision.

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[11] [1928] A.C. 143.

[12] Ibid. 147.

[13] Ibid. 154.

[14] [1928] A.C. 143.

My Lords, numerous authorities besides the *Ormond* case [14] were referred to: and though I do not think that they carry the matter any further, I will comment on some of them. But before doing so, I would make a more general observation. When an Act of Parliament becomes law, and its meaning is plain and unambiguous, a citizen is entitled to order his affairs accordingly, and to act upon the footing that the law is what it unambiguously is. He must be assumed to know that the law may be altered but, if so, he may be assumed to know also that it is contrary to the general principles of legislation in this country to alter the law retrospectively. He should know, too, that, if Parliament alters the existing law retrospectively, it does so by an amendment which is an express enactment, and above all he is surely entitled to be confident that it will not do so by force merely of an assumption or an allusion in a later Act. When the *Ormond* case [15] was heard at first instance by Rowlatt J. he described an argument to the contrary as "a sinister and menacing proposition." So it is, and I hope that your Lordships will have none of it.

My Lords, it follows from what I have said that, even where two Acts are to be read together, it is not permissible to make what is clear in the earlier Act obscure and ambiguous by reference to something in the later Act. The contrary view would be in direct conflict with the decision of this House in the *Ormond* case.[16] What, then, is meant, it may be asked, when it is said that the earlier and later Acts are to be read as one, and how is the decision in the *Ormond* case [16] to be reconciled with what Lord Selborne said in *Canada Southern Railway Co.* v. *International Bridge Co.*[17]? My Lords, I think that the question is easily answered. In the first place, if the earlier Act contains such an ambiguity as I have described, then the proposition can be accepted in its widest sense and recourse can be had to the later to explain the earlier Act. But, secondly, if there is no ambiguity in the earlier Act, then the proposition must have a more limited meaning, and it will be the earlier Act to which recourse may be had to explain a provision of the later Act. It is upon the same principle that, where there has been a judicial interpretation of words in a statute, those words will be deemed to have the same meaning in a subsequent statute dealing with the same subject-matter. I am aware that Lord Selborne used language capable of a wider interpretation, but what he said must be read in the context of that case, in which the difficulty arose not upon the earlier but upon the later Act, and it was to the former that recourse was had to explain the latter. It was not necessary to his decision to hold that an unambiguous provision of an earlier Act can be interpreted by reference to a later one, and I cannot suppose that he meant to decide anything of the kind.

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[14] [1928] A.C. 143.

[15] [1927] 2 K.B. 326, 333.

[16] [1928] A.C. 143.

[17] (1883) 8 App.Cas. 723.

My Lords, I have looked at the later Acts to which the Attorney-General referred in order to satisfy myself that they do not contain a retrospective declaration as to the meaning of the earlier Act. They clearly do not, and I do not think that it has been contended that they do. At the highest it can be said that they may proceed upon an erroneous assumption that the word "sold" in section 17 (1) (*a*) of the Income Tax Act, 1945, has a meaning which I hold it has not. This may be so and, if so, it is an excellent example of the proposition to which reference was made in the report of the Committee of the Privy Council in *In re MacManaway*,[18] and again by my noble and learned friend Lord Radcliffe in *Inland Revenue Commissioners* v. *Dowdall, O'Mahoney & Co. Ld.*,[19] that the beliefs or assumptions of those who frame Acts of Parliament cannot make the law.

My Lords, having, as I say, looked at these Acts and so far satisfied myself, I shall consistently with what I hold to be the true principle of the interpretation of statutes deny myself the pleasure of further examining them. I return to the Act of 1945 and reaffirm that, according to the plain and unambiguous meaning of section 17 (1) (*a*), the respondent company did not sell its wagons to the British Transport Commission.

The appeal should, in my opinion, be dismissed with costs.

LORD MORTON OF HENRYTON. My Lords, the only question which arises on this appeal is whether 663 railway wagons belonging to the respondent company were "sold" within the meaning of section 17 (1) (*a*) of the Income Tax Act, 1945, when the property in these wagons was vested in the British Transport Commission on January 1, 1948, under section 29 of the Transport Act, 1947, and on the terms as to compensation set out in the immediately following sections of that Act.

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[18] [1951] A.C. 161; 66 T.L.R. (Pt. 2) 808.

[19] [1952] A.C. 401; [1952] 1 T.L.R. 560; [1952] 1 All E.R. 531.

Section 17 of the Income Tax Act, 1945, so far as material, is in the following terms: "(1) Subject to the provisions of this "section, where, on or after the appointed day, any of the "following events occurs in the case of any machinery or plant "in respect of which an initial allowance or a deduction under "Rule 6 of the Rules applicable to Cases I and II of Schedule D "has been made or allowed for any year of assessment to a person "carrying on a trade, that is to say, either—(*a*) the machinery or "plant is sold, whether while still in use or not; or (*b*) the "machinery or plant, whether still in use or not, ceases to belong "to the person carrying on the trade by reason of the coming to "an end of a foreign concession; or (*c*) the machinery or plant "is destroyed; or (*d*) the machinery or plant is put out of use "as being worn out or obsolete or otherwise useless or no longer "required, and the event in question occurs before the trade is "permanently discontinued, an allowance or charge (in this Part "of this Act referred to as 'a balancing allowance' or 'a "'balancing charge') shall, in the circumstances mentioned in "this section, be made to, or, as the case may be, on, that person "for the year of assessment in his basis period for which that "event occurs: . . . (2) Where there are no sale, insurance, "salvage or compensation moneys or where the amount of the "capital expenditure of the person in question on the provision of "the plant or machinery still unallowed as at the time of the "event exceeds those moneys, a balancing allowance shall be "made, and the amount thereof shall be the amount of the expenditure still unallowed as aforesaid, or, as the case may be, of the "excess thereof over the said moneys. (3) If the sale, insurance, "salvage or compensation moneys exceed the amount, if any, "of the said expenditure still unallowed as at the time of the "event, a balancing charge shall be made, and the amount on "which it is made shall be an amount equal to the excess or, "where the said amount still unallowed is nil, to the said "moneys."

By section 58 (3) of the Act any references in the Act to a sale of any property are to be read as including a reference to the exchange of any property, but the Attorney-General, for the appellant, did not seek to contend that the transaction now under consideration amounted to an exchange. Section 68 (1) defines "sale, insurance, salvage or compensation moneys" as "(*a*) where the event is a sale of any property, the net proceeds "to that person of the sale." Section 70 provides that the Act "shall be construed as one with the Income Tax Acts."

The Act of 1945 greatly extended the scheme of capital allowances for depreciation of capital assets, for the purpose of the taxation of the profits of business undertakings; a special feature of such allowances was the making of an initial allowance upon the acquisition of the asset, in addition to subsequent annual allowances. The object of the provisions contained in section 17 (1) (*a*) is, I think, plain. The legislature realized that machinery or plant might be sold before the trader had obtained the full amount of the depreciation allowances which might have accrued in respect thereof, and the moneys received on the sale might be less than the written-down value of the asset. This would indicate that the depreciation allowances had not been sufficiently generous in this particular instance, and by way of putting the matter right a " balancing allowance " became claimable by the trader. Conversely, if the moneys received on the sale were in excess of the written-down value of the asset, a " balancing " charge " was imposed, in order to restore to the public revenue the amount by which the past allowances were shown to have been excessive.

It is convenient to turn at once to certain provisions of the Finance Act, 1947, and the Finance Act, 1948, as the Attorney-General submitted, as I think rightly, that these provisions throw much light upon the interpretation of section 17 of the Act of 1945. Section 29 of the Finance Act, 1947, provides, so far as material, as follows: " (1) Where, whether before or after the " passing of this Act, any assets consisting of or of an interest in " any property vest in the National Coal Board by virtue of sec- " tion 5 or section 6 of the Coal Industry Nationalization Act, " 1946, or by virtue of section 44 of, and Schedule III to, that " Act, and, immediately before the date of the vesting thereof, " the assets were assets of a colliery concern . . . the provisions " of Schedule VII to this Act shall have effect in computing the " liability to income tax of the person who was, immediately " before the said date, the owner of the said assets, and of the " said Board respectively."

Schedule VII to the Act, after defining " relevant property " and defining " vest " as vesting in the National Coal Board under certain sections of the Coal Industry Nationalization Act, 1946, sets out certain provisions which are to have effect for the purposes of computing the liability of the Board to income tax for any year of assessment. The only relevant provision for the present purpose is paragraph 3, which reads as follows: " The " vesting of, or of an interest in, any relevant property shall not be "treated as a sale, or as a purchase, for any of the purposes of" (inter alia) Part II of the Income Tax Act, 1945. Part II of the latter Act is the part which contains section 17, already quoted.

By section 74 (4) of the Finance Act, 1947, it is provided that Part III of the Act (which contains section 29) "shall be "construed as one with the Income Tax Acts."

Section 35 of the Finance Act, 1948, is in the following terms: "(1) The question whether any and if so what balancing "allowance or balancing charge falls to be made to or on the "National Coal Board on the occasion of the transfer to the "British Transport Commission under section 29 of the Transport "Act, 1947, of any railway wagons which the said Board acquired "under the Coal Industry Nationalization Act, 1946, shall be "determined as if section 29 of the Finance Act, 1947, and "Schedule VII to that Act, had not been passed. (2) This section "shall be deemed always to have had effect."

Section 82 (4) of the same Act provides that Part III thereof (which contains section 35) "shall be construed as one with the "Income Tax Acts."

The Attorney-General submits that the Income Tax Act, 1945, the Finance Act, 1947, and the Finance Act, 1948, all of which are to be construed as one with the Income Tax Acts, form a statutory code, and that the provisions quoted from the Acts of 1947 and 1948 show that the word "sold" in section 17 of the Income Tax Act, 1945, is not restricted to a sale by mutual assent. I shall return to this argument later, but for the moment I shall summarize the facts of the present case and refer to the provisions of the Transport Act, 1947, under which the respondent company's railway wagons were transferred to the British Transport Commission.

At all material times the respondent company's business was that of a coal merchant. It had a number of subsidiary companies which also carried on business as coal merchants. The company owned railway wagons which were used for the transport of the coal in which the company and its subsidiary companies were dealing, and the company was the owner of 663 such wagons at the time of the transfer to the British Transport Commission. The wagons had all been requisitioned by the Minister of Transport under the powers contained under regulation 53 of the Defence (General) Regulations, 1939. On January 1, 1948, being the date of transfer as defined in the Transport Act, 1947, the property in the wagons so requisitioned was transferred to and vested in the British Transport Commission under section 29 of that Act, which is as follows: " Where, immediately before the " date of transfer, any privately owned railway wagon is " under requisition by virtue of an exercise of the powers in that " behalf conferred by regulation 53 of the Defence (General) " Regulations, 1939—(*a*) the property in that wagon shall vest in " the Commission on the date of transfer, free from any mortgage or other like incumbrance, and the requisition shall then " cease; and (*b*) the Crown shall not be liable for any compensation under the Compensation (Defence) Act, 1939, or otherwise " in respect of any damage to the wagon occurring during the " period of requisition."

Section 30 of the Transport Act, 1947, provides: " Where " under the last preceding section, the property in any wagon " vests in the Commission, the Commission shall, subject to the " provisions of the three next succeeding subsections, pay as " compensation in respect thereof an amount determined, by " reference to the type of wagon and the year in which the wagon " was first built, in accordance with the Table set out in Schedule " VI to this Act." The table in Schedule VI sets out a sliding scale of payments adjusted according to the type of wagon and the year in which the wagon was first built. To give one instance —for an eight-ton wagon first built in 1946 the owner would receive £248, but for a similar wagon first built in 1902 he would only receive £16 10s. Subsections (2), (3) and (4) contain provisions under which, in certain circumstances, the sums set out in Schedule VI are varied. Section 32 (1) provides that the amount payable by way of compensation in respect of a wagon should be satisfied by the issue to the person entitled thereto of British Transport stock, but it is not suggested by either party that this provision has any bearing upon the question arising for decision.

These, then, were the statutory provisions under which the respondent company's wagons passed from its ownership into the ownership of the British Transport Commission. It is only necessary to add that there is no dispute in regard to figures in this case; the sole question is, as I have said, whether the wagons were " sold " to the Commission within the meaning of section 17 (1) (*a*) of the Income Tax Act, 1945.

My Lords, before I return to a consideration of the words of that section I shall try to clear the ground by dealing with certain preliminary questions much debated in your Lordships' House. The first preliminary question is whether it is a correct use of the English language to describe as a " sale " a transaction in which the ownership of property is transferred from A to B on the terms that B shall pay a sum of money to A, but the element of mutual assent is absent.

Mr. Senter, for the respondent company, contends that the answer to this question should be "No." His "sheet-anchor" is the following passage from Benjamin on Sale, 2nd ed. (1873), p. 1: "By the common law a sale of personal property is usually "termed 'a bargain and sale of goods.' It may be defined to be "a transfer of the *absolute or general* property in a thing for a "price in *money*. Hence it follows, that to constitute a valid "sale, there must be a concurrence of the following elements, "viz.: (1) parties competent to contract; (2) mutual assent; (3) a "thing, the absolute or general property in which is transferred "from the seller to the buyer; and (4) a price in money paid or "promised." The Attorney-General points out, however, that Benjamin's definition of a sale is contained in the words "a "transfer of the absolute or general property in a thing for a price "in money." The marginal note to the four "elements" just set out is "The elements of the contract," indicating that at this stage the author is dealing only with a sale which is of a contractual nature. The Attorney-General relies on definitions by other writers which omit the element of mutual assent. To give two instances—in Blackstone's Commentaries, 19th ed. (1836), vol. 2, p. 466, the following definition appears: "Sale or "exchange is a transmutation of property from one man to "another in consideration of some price or recompense in value," while in Chalmers, Sale of Goods, 12th ed., p. 172, it is said that "the essence of sale is the transfer of the ownership or general "property in goods from sellers to buyer for a price." The Attorney-General points out that in neither of these definitions is the element of mutual assent mentioned.

My Lords, the question whether it is a correct use of the English language to describe as a "sale" a transaction from which the element of mutual assent is missing is no doubt an interesting one. I think, however, that this question loses its importance for the purpose of the decision of this appeal when it is realized that for the last 100 years transactions by which the property of A has been transferred to B, on payment of compensation to the owner but without the consent of the owner, have been referred to many times, in Acts of Parliament, in opinions delivered in this House, in judgments of the Court of Appeal and the High Court of Justice, and in textbooks as a "sale"—generally as a "compulsory sale." Many instances might be given but I shall confine myself to a few.

In the Lands Clauses Consolidation Act, 1845, between section 15 and section 16 there is a general heading "And with "respect to the *purchase* and taking of lands otherwise than by "agreement," while in section 82 (under the heading "And with "respect to the conveyances of land") the owner whose land is being acquired is called "the Seller" and the acquiring body is called "the Purchaser." Again, in section 92 one finds the word "*sell*" in regard to compulsory taking of land. See also the Local Government Act, 1894, s. 9 (1) and (10).

In *Inland Revenue Commissioners* v. *Glasgow and South-Western Railway Co.*[20] one finds[21] the words "compelled to "sell"; compensation is referred to as the "price,"[22] and there is a reference to "consideration for the sale."[23]

In *In re Lord Gerard and London and North Western Railway Co.'s Arbitration*,[24] Rigby L.J. said in reference to the Railway Clauses Consolidation Act, 1845, "The object of the statute "evidently was to get rid of all the ordinary law on the subject, "and to compel the owner to sell the surface, and if any mines "were so near the surface that they must be taken for the purposes of the railway, to compel him to sell them, but not to "compel him to sell anything more."

The case of *Newcastle Breweries Ld.* v. *Inland Revenue Commissioners*,[25] referred to later, affords a striking modern instance of the use of the word "sale" as applied to a compulsory taking of goods. Finally, the heading of the article dealing with the subject in Halsbury's Laws of England, 2nd ed., vol. 6, p. 1, is "Compulsory purchase of land and compensation."

In these circumstances, whether this use of the word "sale" was originally correct or incorrect, I find it impossible to say that the only construction which can fairly be given to the word "sold" in section 17 (1) (*a*) of the Income Tax Act, 1945, is to limit it to a transaction in which the element of mutual assent is present. I incline to think that in a modern statute the word should be construed as including a compulsory acquisition on payment of compensation, in the absence of a context limiting its meaning to sales by mutual assent; but at least the word is fairly capable of the wider meaning, and it is necessary to look at the

[20] (1887) 12 App.Cas. 315.

[21] Ibid. 321.

[22] Ibid. 325.

[23] Ibid. 326.

[24] [1895] 1 Q.B. 459, 469–70; 11 T.L.R. 170.

[25] 96 L.J.K.B. 735.

context in which it is used in order to ascertain the intention of the legislature.

The second preliminary question arises by reason of an argument put forward by Mr. Senter. He contended that even if the word " sold " can be construed as including a compulsory acquisition of property by the machinery prescribed in the Lands Clauses Consolidation Act, 1845, it is a further step, and a step which is not justified, to apply the word to the transaction now under consideration. He suggests that the machinery for the taking of land under the Lands Clauses Consolidation Act, 1845, to some extent resembles a sale by mutual assent. For instance, it gives the owner a chance of being heard as to the amount of the compensation money, and there is ultimately a conveyance of the land to the body which acquires it, whereas in the transaction now under consideration (1) there is no conveyance, the property in the wagons being simply vested in the commission by section 29 of the Transport Act, 1947; (2) the owner is given no opportunity of making representations as to the amount of compensation, which is regulated solely by the provisions of section 30 and Schedule VI to the Act.

My Lords, if once it is accepted that the words " sale " and " sold " are capable of applying to a compulsory sale of the kind described, e.g., in the Lands Clauses Consolidation Act, 1845, I find it impossible to hold that they are not equally capable of applying to a transaction such as the one which your Lordships are now considering. The differences relied upon by Mr. Senter are merely differences in the machinery for carrying out two transactions which are essentially of the same type, namely, compulsory transfers of property with payment of compensation to the transferor. The differences in machinery are due to the nature of the property and to the surrounding circumstances. The vesting provisions in the Transport Act, 1947, were applied to a large number of clearly identifiable wagons which were all already under requisition by the Minister of Transport; there was no need for any formal document of transfer, and a vesting declaration was the obvious way of transferring the property. Nor was there any need for elaborate provisions for valuing the property. A separate valuation by experts of each one of many thousands of wagons taken over under the Act of 1947, according to the actual condition of each wagon, would have been prolonged and expensive, and the comprehensive scheme of valuation set out in Schedule VI was obviously intended to give the dispossessed owner an over-all price fixed according to the type of wagon and its number of years of service. Moreover, the provisions in section 30 of the same Act show that questions of detail as to the value could be considered in special cases. I would add that in the case of *Newcastle Breweries Ld.* v. *Inland Revenue Commissioners*,[26] the Admiralty, acting under the Defence of the Realm Regulations, had taken over a large stock of rum from the respondent company and in the judgments of Rowlatt J., of the Court of Appeal, and in your Lordships' House, the transaction is constantly described as a "compulsory sale." For instance, Rowlatt J. said [27]: "what is that except a compulsory sale of "the rum? . . . That is all it is: a compulsory sale of the rum." Lord Hanworth M.R. said [28] that the requisitioning of the rum "caused it to be dealt with rather sooner than later; but along "the same channel down which it was always intended that it "should pass from the appellants' possession—namely, by sale." In your Lordships' House, Viscount Cave L.C. said [29]: "If the "raw rum had been voluntarily sold to other traders, the price "must clearly have come into the computation of the appellants' "profits, and the circumstance that the sale was compulsory and "was to the Crown makes no difference in principle. . . . The "transaction was a sale in the business, and, although no doubt it "affected the circulating capital of the appellants, it was none "the less proper to be brought into their profit and loss account." I can see no relevant distinction, for the present purpose, between a requisitioning of rum and a compulsory transfer of wagons.

Singleton L.J. asked the question [30]: "Did Hudsons sell their "wagons to the Commission?", and continued: "I am quite sure "what the answer of Hudsons would be, but that is not much "help. What would anyone accustomed to the use of the words "'sale' or 'sold' answer? It seems to me that everyone must "say 'Hudsons did not sell.'" My Lords, I would agree that not much help can be obtained by considering what would have been the answer of a director of the respondent company; but if the question were to be put to ten persons unconnected with the company, I should think it quite likely that five of them might say: "No, the wagons were taken over under the Transport "Act," and the other five might say: "Yes," adding, possibly, "but it was a compulsory sale" or "because they had to do it."

For these reasons I would dispose of the second preliminary question by rejecting Mr. Senter's argument and concluding that if a transfer of land under the Lands Clauses Consolidation Act, 1845, is capable of being included within the words " sale " and " sold," so also is the transaction now under consideration.

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[26] 96 L.J.K.B. 735.

[27] 134 L.T. 506, 510.

[28] 95 L.J.K.B. 936, 939; 42 T.L.R. 609.

[29] 96 L.J.K.B. 735, 737.

[30] [1954] 1 W.L.R. 40, 46.

My Lords, I trust that in dealing with the two preliminary questions I have made good the proposition that the phrase " is sold " in section 17 of the Income Tax Act, 1945, is fairly open to either one of two interpretations, namely, (*a*) that it refers only to sales made in pursuance of a contract; or (*b*) that it includes any transfer of ownership of plant or machinery from one to another " in consideration of some price or recompense in " value," to quote again from Blackstone. If the wider interpretation is accepted, the transaction now in question clearly comes within it.

Thus a question of construction exists, and the materials for determining it are the terms of the Act of 1945, read in conjunction with the provisions already quoted from the Finance Act, 1947, and the Finance Act, 1948.

Turning first to section 17 of the Act of 1945, I note that it is designed for the practical purpose of producing a fair and reasonable result in two contrasted cases, one of which results in a balancing allowance and the other in a balancing charge. It would, indeed, be strange if the trader could get a balancing allowance if he voluntarily sold his plant at a price below the written-down value, but could get no balancing allowance if the plant were taken from him against his will, and the price or compensation paid to him were below the written-down value. The material point under the section is not the method by which the plant was transferred and the price fixed, but the *fact* of the transfer and of the deficiency in price. Similar observations apply with equal force to the converse case in which a balancing charge becomes payable. Mr. Senter suggested that section 17 was a " charging section " and should be construed strictly. It is true that in one event the section imposes a charge upon the subject, but it is equally true that in another event it confers a benefit upon him, and the words " is sold " must bear the same meaning in each event. In these circumstances, I do not think that the principle of strict construction of a charging section can be applied in this case.

So far it appears to me that the construction for which the Crown contends is the one which best fits the spirit and intent of the section. I now turn to the provisions in the Finance Act, 1947, and the Finance Act, 1948, upon which the Attorney-General relied so strongly. As I have already pointed out, these two Finance Acts contain an operative direction that (inter alia) the provisions therein which I have already quoted " shall be " construed as one with the Income Tax Acts," and the Attorney-General submitted that the relevant provisions of the three Acts formed one statutory code in regard to balancing charges or allowances, and should be looked at as a whole, as if they were all in one comprehensive Act, for the purpose of interpreting the words " is sold " in section 17 of the Act of 1945.

My Lords, in the absence of authority I should have thought that when Parliament says that two or more statutes are to be construed as one, it means that questions of construction *must* be approached in the manner just described; and this view is by no means unsupported by authority. In *Canada Southern Railway Co.* v. *International Bridge Co.*,[31] the Earl of Selborne L.C. said in regard to two Acts of the Canadian legislature, " It is to be " observed that those two Acts are to be read together by the " express provision of the 7th and concluding section of the " amending Act; and therefore we must construe every part of " each of them as if it had been contained in one Act, unless there " is some manifest discrepancy, making it necessary to hold that " the later Act has to some extent modified something in the " earlier Act." This principle has been adopted and applied in many cases (see for instance *Hart* v. *Hudson Brothers Ld.*[32]; *Phillips* v. *Parnaby*[33]; *Rex* v. *Folkestone and Area Rent Tribunal*[34]) and Lord Selborne's words are reproduced in Maxwell on Interpretation of Statutes, 10th ed., p. 34, as stating the present law.

Mr. Senter, however, submitted that in the first instance your Lordships must look only at the Income Tax Act, 1945, and decide, on the wording of that Act alone, whether the words " is " sold " in section 17 (1) (*a*) were " ambiguous." If these words, so regarded, were ambiguous, then and then only could the Acts of 1947 and 1948 be referred to; if the words were unambiguous, no attention could be paid to the later Acts, notwithstanding the statutory direction that they were to be construed as one with (inter alia) the Act of 1945. He relied upon certain observations by members of this House in *Ormond Investment Co. Ld.* v. *Betts.*[35] I am not satisfied that these observations entirely justify Mr. Senter's submission, but I need not pursue this matter further, as in my view each of the alternative methods of approach leads to the same result. In the last-mentioned case Lord Atkinson said[36]: "where the interpretation of a statute is "obscure or ambiguous, or readily capable of more than one "interpretation, light may be thrown on the true view to be "taken of it by the aim and provisions of a subsequent statute." This he referred to as "a well-recognized principle dealing with "the construction of statutes." Lord Buckmaster in the same case said[37]: "It is also possible that where Acts are to be read "together, as they are in this case, a provision in an earlier Act "that was so ambiguous that it was open to two perfectly clear "and plain constructions could, by a subsequent incorporated "statute, be interpreted so as to make the second statute "effectual, which is what the courts would desire to do."

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[31] 8 App.Cas. 723, 727.

[32] [1928] 2 K.B. 629; 44 T.L.R. 820.

[33] [1934] 2 K.B. 299; 50 T.L.R. 446.

[34] [1952] 1 K.B. 54; [1951] 2 T.L.R. 997; [1951] 2 All E.R. 921.

My Lords, for some time I found it difficult to understand what Lord Buckmaster had in mind when he referred to "two "perfectly clear and plain constructions," for it is not easy to see how each one of two possible constructions of an ambiguous Act could be perfectly clear and plain. I think, however, Lord Buckmaster meant that it must be perfectly clear and plain what are the two possible constructions, and I do not think that he intended to differ in any way from the principle as stated by Lord Atkinson.

In the present case it seems to me clear and plain that the two possible interpretations of section 17 (1) (*a*) are those which I have already set out, and I have already stated my view that the words "is sold" are (to quote Lord Atkinson) "readily "capable of more than one interpretation"; having regard to the widespread modern use of the words "sale" and "purchase" in regard to compulsory acquisitions of property. If this is so, your Lordships are admittedly at liberty to call in aid the provisions of the two later Acts, in order to ascertain which interpretation is in accordance with the intention of the legislature. These provisions make it clear, in my view, that by the words "is sold" in section 17 (1) (*a*) the legislature intended to include a compulsory transfer such as the one now in question. Paragraph 3 of Part III of Schedule VII to the Finance Act, 1947, shows that such a vesting of property in the National Coal Board as is there

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[35] [1928] A.C. 143.
[36] Ibid. 164.
[37] Ibid. 154.

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mentioned was regarded by the legislature as constituting a "sale," within the meaning of (inter alia) section 17 of the Income Tax Act, 1945; otherwise paragraph 3 would have been unnecessary; and it was not contended that the statutory vesting of property in the National Coal Board differed, in any material particular, from the statutory vesting of property in the British Transport Commission which was effected by section 29 of the Transport Act, 1947. Section 35 of the Finance Act, 1948, drives the point home even more forcibly, for it shows clearly that a balancing charge could become payable on a vesting of property in the British Transport Commission by section 29 of the Transport Act, 1947—the same section which vested the respondent company's wagons in that Commission; and a balancing charge could only become payable if such vesting was a sale within the meaning of section 17 (1) (*a*) of the Income Tax Act, 1945.

For these reasons, my Lords, I am of opinion that the Special Commissioners were right in holding that the respondent company became accountable for a balancing charge in the present case.

I should add that Mr. Senter relied strongly upon certain observations of my noble and learned friends, Lord Reid and Lord Radcliffe, in *Inland Revenue Commissioners* v. *Dowdall, O'Mahoney & Co. Ld.*[38] In my view, these observations have no application to the present case. There has been here no decision that the words "is sold" in section 17 of the Income Tax Act apply only to sales by mutual assent, and no "unfounded "assumption" by Parliament. In effect, Parliament has made clear, in a composite Act, the meaning of words used in one portion of that Act, by words used in another portion thereof. Reference was also made to observations of my noble and learned friend, Lord Radcliffe, in delivering the judgment of the Board in *In re MacManaway*[39]; but the Board was not dealing in that case with Acts which were to be construed as one.

I would allow the appeal and uphold the assessment under review.

LORD REID. My Lords, section 29 of the Transport Act, 1947, provided that privately owned railway wagons under requisition should vest in the Transport Commission, and 663 wagons which belonged to the respondents vested in the commission under that section. Section 30 required the commission to pay as compensation an amount determined in a schedule to the Act by reference to the type and age of each wagon, and section 32 made the compensation payable by an issue of British Transport stock.

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[38] [1952] A.C. 401.

[39] [1951] A.C. 161, 177.

The Income Tax Act, 1945, provides that a balancing charge shall be payable in certain events. Under section 17, which applies to machinery and plant, one of those events is where "(*a*) the machinery or plant is sold, whether while still in use "or not." The present case turns on the meaning of the word "sold" in this context. If the vesting of the respondents' wagons in the commission was a sale within the meaning of this section then this appeal must succeed; if not, it must fail.

These Acts are United Kingdom Acts, and it is therefore relevant to consider both the law of England and the law of Scotland in interpreting them, for they must be intended to have the same effect in both countries. I do not think that there is any relevant difference between the law in the two countries, but I make no apology if I use some terms more appropriate in the law of Scotland. "Sale" is, in my opinion, a nomen juris; it is the name of a particular consensual contract. The law with regard to sale of chattels or corporeal movables is now embodied in the Sale of Goods Act, 1893. By section 1 (1) "A contract of sale "of goods is a contract whereby the seller transfers or agrees to "transfer the property in goods to the buyer for a money con"sideration, called the price," and by section 1 (3): "Where "under a contract of sale the property in the goods is transferred "from the seller to the buyer the contract is called a sale; but "where the transfer of the property in the goods is to take place "at a future time or subject to some condition thereafter to be "fulfilled the contract is called an agreement to sell." As a contract of sale, as distinct from an agreement to sell and unlike other contracts, operates by itself and without delivery to transfer the property in the thing sold, the word "sale" connotes both a contract and a conveyance or transfer of property.

But the appellant maintains not only that the word "sale" is capable of having a wider or different meaning than that, but that its ordinary and correct meaning does not involve any contract but is simply the transfer of the property in or the ownership of a thing from one person to another for a money price, and that any sum of money which accrues to the former owner on the transfer is properly called a price. He says that the word "sale" is equally apposite whether the transfer is voluntary or takes place by operation of law, and that the word "price" is equally apposite whatever be the way in which the sum of money payable to the former owner is determined.

It is true that "compulsory purchase" has long been a familiar phrase. The word "purchase" is frequently used in the Lands Clauses Consolidation Acts. The confused drafting of these Acts has often been commented on, but I think that it may fairly be said that the method and machinery which they provide to enable undertakers to acquire land compulsorily has been made to look as like an ordinary sale as possible. In Scotland, service of the notice to treat has been held equivalent to the making of a contract to sell the land comprised in the notice, and in England the relation of vendor and purchaser has been held to arise at least when the amount of compensation is ascertained. The Acts contain elaborate provisions enabling the owner to sell even if under disability and for determining the amount of the purchase-money or compensation if that is not agreed, and it is only if the owner fails to execute a conveyance after the purchase-money has been deposited that the undertakers can themselves take the necessary steps to acquire the property. So it is not surprising that the phrase "compulsory purchase," or "compulsory sale," has come to be used to describe the operation of the Acts. But it has certainly not been common to use the words "purchase" or "sale" by themselves to describe compulsory acquisition; indeed, I do not think that we were referred to any case in which either word was so used.

Compulsory acquisition of personal or movable property was at least infrequent before the 1914 war, and the first instance to which we were referred of the use of the phrase "compulsory "sale" in this connexion was in *Newcastle Breweries Ld.* v. *Inland Revenue Commissioners*.[40] There the Admiralty had requisitioned a quantity of rum, and the question was whether the whole of the compensation which the company received was a trading receipt. A sum may well be a trading receipt although it does not come to the trader as the price of goods sold. But the company relied on the fact that they did not sell the rum, and the expression "compulsory sale" of the rum was used both by Rowlatt J. and in this House in rejecting that argument for the taxpayer. I do not think that it was intended to mean either that the compulsory acquisition was in fact a sale or that for all purposes it was equivalent to a sale, but only that it had the same effect as a sale in making the sum received a trading receipt.

Then cases were cited on the question whether a particular instrument was a "conveyance or transfer on sale" within the

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[40] 96 L.J.K.B. 735.

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meaning of the Stamp Act, 1891. In one case, where the acquisition was compulsory, the instrument was a disposition granted by the owner, but generally, although the final step may not have been, strictly speaking, a sale, the transaction originated from an agreement. Lord Esher M.R. said in *Great Western Railway Co.* v. *Inland Revenue Commissioners*[41]: " Turning to the Stamp " Act, the words used are ' a conveyance on sale.' Does that " expression mean a conveyance where there is a definite contract " of purchase and sale preceding it? Is that the way to construe " the Stamp Act, or does it mean a conveyance the same as if it " were upon a contract of purchase and sale? The latter seems " to me to be the meaning of the phrase as there used." I cannot get from these cases any guidance as to what is and what is not in fact a sale.

The appellant relied greatly on descriptions of sale by various writers—for they were hardly definitions. These authors did not mention the contractual element of sale, but they were not dealing with compulsory acquisition and I cannot infer from their words that if they had been dealing with it they would have said that compulsory acquisition was truly a sale. Transfer of ownership or possession may follow on barter or donation or pledge or hiring or loan or deposit or their English equivalents, but if I found a description of any of these which omitted to mention the contractual or mental element I would not infer that the author thought that any of these terms could properly be regarded as applicable to a compulsory transfer of ownership or possession.

I do not think that any of the authorities cited for the appellant supports the appellant's contention as to the proper and usual meaning of the word " sale," but I would agree that " sale " is a word which has become capable in an appropriate context of having a meaning wider than its ordinary and correct meaning. But it is only permissible to give to a word some meaning other than its ordinary meaning if the context so requires —so I turn to the context.

I find nothing in the Income Tax Act, 1945, to justify giving to the word " sale " a meaning wider than its ordinary meaning. In a taxing Act, and particularly in a charging section, one assumes that language is used accurately unless the contrary clearly appears, and, in my opinion, section 17 is a charging section. It is the only section which could authorize the assessment in this case. It is true that its provisions may sometimes favour the taxpayer by entitling him to a balancing allowance. But that does not prevent it from being a charging section as regards those whom it makes liable to pay tax, and "no tax can "be imposed on the subject without words in an Act of Parlia-"ment clearly showing an intention to lay a burden on him" (*per* Lord Blackburn in *Coltness Iron Co. Ld.* v. *Black*[42]). It may be that there is no apparent reason why the taxpayer should be subject to a balancing charge or entitled to a balancing allowance if his plant is sold, but not if it is taken compulsorily, but "if "the Crown, seeking to recover the tax, cannot bring the subject "within the letter of the law, the subject is free, however appa-"rently within the spirit of the law the case might otherwise "appear to be" (*per* Lord Cairns in *Partington* v. *Attorney-General*[43]).

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[41] [1894] 1 Q.B. 507, 512.

The context in section 17 appears to me to be rather against the appellant: in subsection (1) (*b*) the words are "the machinery "or plant . . . ceases to belong to the person carrying on the trade "by reason of the coming to an end of a foreign concession." There is no apparent reason for the difference between that form of words and the words in subsection (1) (*a*)—"the machinery or "plant is sold," but the contrast must have been deliberate. And, even if the appellant is right, admittedly the section does not apply if machinery or plant is confiscated, there being nothing which could be called a price receivable by the owner. No doubt it was not contemplated that machinery or plant would be confiscated in this country, but a taxpayer trading in this country might have machinery or plant abroad which might be confiscated without there being any termination of a concession and, although the need for a balancing allowance would then be greater than if he received compensation, admittedly the section would not entitle him to it. So on any view there are cases to which one would expect the section to apply but which it does not cover. In my judgment, if one does not look beyond the Act of 1945, compulsory acquisition is plainly not within the scope of section 17.

But the appellant maintains that we must interpret the Act of 1945 in the light of subsequent legislation. Section 29 of the Finance Act, 1947, provides that where assets vest in the National Coal Board the provisions of Schedule VII to the Act shall have effect in computing the liability to income tax of the former owner and of the Board. Part II of the Schedule deals with the liability of the transferor and provides that Parts I, II, III, V and VI of the Income Tax Act, 1945, shall be deemed never to have applied in relation to the relevant property. Part III of the Schedule deals with the liability of the National Coal Board and provides: "3. The vesting of, or of an interest in, any relevant "property shall not be treated as a sale, or as a purchase, for any "of the purposes of Parts I, II, III, V and VI of the Income Tax "Act, 1945, or of Part IV of the Finance Act, 1944." Parts I and II of the 1945 Act are those which deal with balancing allowances and charges. The vesting provisions of the Coal Industry Nationalization Act, 1946, are complicated. Some property vested automatically, but with regard to other property the owner had a right to object if the Board wished to take it. Compensation, determined by an elaborate process, was payable except as to some interests mentioned in Schedule III. So there is considerable similarity between the vesting in the National Coal Board and the vesting of the wagons in the present case.

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[42] (1881) 6 App.Cas. 315, 330.

[43] (1869) L.R. 4 H.L. 100, 122.

It is not easy to follow these elaborate provisions, but I think that the appellant can at least say that it was unnecessary to mention Part II of the Act of 1945 in the paragraph which I have quoted from the Schedule to the Act of 1947 if the vesting of plant and machinery in the National Coal Board was not a sale within the meaning of Part II of the Act of 1945. And it may well be that if the respondents in this case are right the whole of that paragraph in the 1947 Act was unnecessary. The appellant's argument is that Parliament must have thought it necessary to enact the paragraph and could only have thought it necessary on the view that "sale" in the 1945 Act did include compulsory vesting of property in the National Coal Board; Parliament has therefore supplied an authoritative interpretation of the 1945 Act.

The other provisions on which the appellant relied are sections 34 and 35 of the Finance Act, 1948. Section 34 deals with certain property transferred under, inter alia, the Transport Act, 1947, but it does not apply to these railway wagons. Subsection (2) enacts that a transfer to which that section applies "shall be "treated for income tax purposes as a sale of property to which" certain special provisions of the Act of 1945 apply. I cannot see that this section could throw any light on the question in this case; its provisions are equally apposite and necessary whether the transfers to which it applies are sales within the meaning of the 1945 Act or not.

Section 35 of the 1948 Act is closer to the present case; it applies to some railway wagons although not to those which belonged to the respondents. It enacts: "(1) The question "whether any and if so what balancing allowance or balancing "charge falls to be made to or on the National Coal Board on "the occasion of the transfer to the British Transport Commission "under section twenty-nine of the Transport Act, 1947, of any "railway wagons which the said Board acquired under the Coal "Industry Nationalization Act, 1946, shall be determined as if "section twenty-nine of the Finance Act, 1947, and the Seventh "Schedule to that Act, had not been passed. (2) This section "shall be deemed always to have had effect."

This is a retrospective amendment of the provisions of the 1947 Act to which I have already referred. The second subsection cannot mean more than that the section shall be deemed to have had effect from the moment when the 1947 Act was passed. It could not possibly have had any effect before that; it would not make sense to interpret "always" as meaning that the section must be deemed to have had effect before balancing charges were first imposed, or for that matter before income tax was first imposed. To my mind, the question whether this section can be used to interpret the 1945 Act is precisely the same as the question whether the 1947 Act, which it amends, can be used for that purpose. The appellant can say with regard to this section, as with regard to parts of the 1947 Act, that it is unnecessary if the respondents' argument in this case is right, and the argument following on that can be repeated, but I do not think that this section carries it any farther. This section does not declare that the provisions of section 17 of the Act of 1945 apply to the transferred railway wagons; it merely states that the question whether any and if so what balancing allowance or balancing charge falls to be made shall be determined under the 1945 Act as if the 1947 Act had not been passed. If these wagons were not "sold" then the question whether any balancing allowance or balancing charge falls to be made will be determined in the negative. There will be no conflict with the provisions of this section.

I must now consider the question whether these provisions of the 1947 and 1948 Acts can be used to interpret the word "sold" in the 1945 Act. The later Acts both contain the provision that those parts of them which relate to income tax "shall be con"strued as one with the Income Tax Acts." At first sight that might seem to mean that you must regard the relevant provisions of all the Acts as if they were all contained in the same Act, so that before you begin to construe any one of them you read the whole of them, and then construe in the light of all of them. That was the view expressed by Lord Selborne in delivering the judgment of the Privy Council in *Canada Southern Railway Co.* v. *International Bridge Co.*[44] He said: "It is to be observed "that those two Acts are to be read together by the express "provision of the seventh and concluding section of the amending "Act; and therefore we must construe every part of each of "them as if it had been contained in one Act, unless there is "some manifest discrepancy, making it necessary to hold that "the later Act has to some extent modified something found in "the earlier Act." But that passage must be read in light of the facts of that case and the question which had to be determined. In that case the earlier Act contained a general power to fix charges and the question was whether the later Act cut down that power; the meaning of the later Act was the difficulty. It was not necessary to use the provisions of the later Act to attach to a provision in the earlier Act some meaning which it would not otherwise have borne.

The question how far a later Act could be used to interpret an earlier Act was considered in this House in *Ormond Investment Co. Ld.* v. *Betts*.[45] Schedule D, Case V, Rule 1, of the Income Tax Act, 1918, provided that tax on income from foreign stocks and shares should be computed "as directed in Case I." It was held that that was not ambiguous, the only relevant rule was the rule applicable to Case I, Rule 1 (2) of the rules applicable to Cases I and II had no application, and the result was that the assessment for the year in question should be nil. The Crown founded on section 26 of the Finance Act, 1924, in which Act there was the usual provision that it should be construed as one with the Income Tax Acts. That section added a new rule to the rules applicable to Case V which provided that, if "the total "amount of tax computed in accordance with Rule 1 of the "rules applicable to Cases I and II" exceeded another sum the taxpayer should be entitled to repayment of the excess. The argument was that this new rule amounted to a declaration by Parliament that "as directed by Case I" meant in accordance with the rules applicable to Cases I and II, for unless that was the meaning the new rule had no application. Rowlatt J. said, with regard to this argument[46]: "Am I to give effect to that "argument? It formulates what I may almost call a sinister and "menacing proposition, because it means nothing less than this, "that, on the assumption that I am right in my view of the

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[44] 8 App.Cas. 723, 727.

[45] [1928] A.C. 143.

[46] [1927] 2 K.B. 326, 333.

"sections, apart from the effect of section 26 of the Act of 1924, "Parliament has retrospectively by allusion taxed something "which was not taxed at the time by previous legislation."

The judgment of Rowlatt J. was reversed by the Court of Appeal but restored in this House. On this question the House was unanimous. Lord Buckmaster had dissented on an earlier question but thought it desirable to express his opinion on this question. He said [47]: "I do not think that, in the circumstances "of this case, the subsequent statute can properly be referred to "for the purpose of interpreting the earlier. It is, of course, "certain that Parliament can by statute declare the meaning of "previous Acts. It would be competent for them to do so, even "though their declaration offended the plain language of the "earlier Act. . . . It is also possible that where Acts are to be "read together, as they are in this case, a provision in an earlier "Act that was so ambiguous that it was open to two perfectly "clear and plain constructions could, by a subsequent incorporated statute, be interpreted so as to make the second statute "effectual, which is what the courts would desire to do. . . ." A little later he said [48]: "The first Act will operate from its fixed "date so that its interpretation becomes at once a matter of "necessity, and great unfairness may ensue if an interpretation "which an Act of Parliament would fairly bear unaided by "subsequent statutes was inferentially changed by other words "in a subsequent Act." Lord Sumner [49] referred to the need for the earlier legislation being "ambiguous, so that while the words "are reasonably capable of two different meanings, there is no "reason on the face of the Act why one should be more right "than the other," and said that [50] "the new rule cannot be "regarded as imposing a non-natural construction on Rule 1." Lord Atkinson referred [51] to "a well recognized principle dealing "with the construction of statutes—namely, that where the "interpretation of a statute is obscure or ambiguous, or readily "capable of more than one interpretation, light may be thrown "on the true view to be taken of it by the aim and provisions "of a subsequent statute." Lord Wrenbury said [52]: "In my "opinion an Act of 1924 passed on August 1, 1924, which is not "expressed to be retrospective and does not directly or inferentially purport to put a construction upon a previous Act can "have no bearing upon a question arising upon events which

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[47] [1928] A.C. 143, 154.

[48] Ibid. 155.

[49] Ibid. 159.

[50] Ibid. 160.

[51] Ibid. 164.

[52] Ibid. 167–8.

"happened in 1922 and as to which the last relevant date is "April 5, 1924."

Finally, Lord Warrington of Clyffe said this with regard to section 26 of the 1924 Act [53]: "It was said that the effect of this "section is to declare that the construction of the Income Tax "Act for which the Crown now contends is and always has been "the true construction. Much reliance was placed on this point "by Sargant L.J., but with all respect to that learned judge I "cannot concur in his view. The section does not contain any "such declaration express or implied. It merely assumes that "persons may have paid tax computed in accordance with Rule 1 "of the Rules applicable to Cases I and II of Schedule D, and "gives those persons the relief mentioned in the section. It says "nothing about the legality or otherwise of such computation. "To read the section as amounting to a retrospective declaration "as to the true construction of the previous Act seems to me to "give it an effect which it will not bear."

My Lords, this decision of this House appears to me to afford conclusive and binding authority for the proposition that, in construing a provision of an earlier Act, the provisions of a later Act cannot be taken into account except in a limited class of case, and that that rule applies although the later Act contains a provision that it is to be read as one with the earlier Act. Of course, that does not apply where the later Act amends the earlier Act or purports to declare its meaning: in such cases the later Act operates directly by its own force. But where the provisions of the later Act could only operate indirectly as an aid to the construction of words in the earlier Act those provisions can only be used for that purpose if certain conditions apply to the earlier Act when it is considered by itself.

The Acts of 1947 and 1948 do not purport to amend the Act of 1945 nor do they, in my opinion, even inferentially purport retrospectively to declare its meaning. So the question is whether section 17 (1) (*a*) of the Act of 1945 taken in its context in that Act is, as Lord Buckmaster put it, so ambiguous that it is open to two perfectly clear and plain constructions, or whether, as Lord Sumner put it, there is no reason on the face of the Act why one construction should be more right than the other, or whether, as Lord Atkinson put it, the 1945 Act is readily capable of more than one interpretation. A provision is not ambiguous merely because it contains a word which in different contexts is capable of different meanings. It would be hard to find anywhere a sentence of any length which does not contain such a word. A provision is, in my judgment, ambiguous only if it contains a word or phrase which in that particular context is capable of having more than one meaning. So the *Ormond* case [54] requires one to consider whether the word "sold" in its context in the 1945 Act is readily capable of more than one interpretation. I have already expressed my opinion that it is not. Moreover, I think that, taking the whole trend of the speeches in that case, Lord Sumner must be right in his view that the later Act cannot be used to impose a non-natural construction on the words of the earlier Act, and to hold that "sale" includes compulsory acquisition would, in my view, be to impose on that word a non-natural though in some contexts an appropriate construction.

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[53] [1928] A.C. 143, 172.

I would only add that the canon of construction established by the *Ormond* case [54] may not be entirely logical, but on a broader view I think that there are very good grounds for it and I would not be prepared to whittle it away by fine distinctions.

Two later cases were cited on this matter. In *In re MacManaway* [55] I do not find anything in the judgment of the Privy Council delivered by Lord Radcliffe which conflicts in any way with my reading of the speeches in the *Ormond* case [56] and I do not think it necessary to examine this case in detail. The other case, *Inland Revenue Commissioners* v. *Dowdall, O'Mahoney & Co. Ld.*,[57] was dealing with rather a different question. There, the earlier statutory provisions could not be said to be ambiguous because their meaning had formed the subject of decisions in this House, and so the later Act could only have effect if it could be held to enact an amendment. But it was held that it could not be so interpreted. The *Ormond* [58] problem did not arise.

In my judgment this appeal should be dismissed.

My Lords, my noble and learned friend, Lord Somervell of Harrow, who is unable to be here this morning, has asked me to say that he has read the opinion which I have delivered and that he agrees with it.

Lord Tucker. My Lords, the question for decision in this appeal is the meaning of the word "sold" in section 17 (1) of the Income Tax Act, 1945, which describes certain events upon the happening of which a "balancing charge" or "balancing "allowance," as the case may be, shall be made upon or allowed to a person carrying on a trade for the purpose of computing the tax payable by him in a particular year of assessment. The relevant event is that referred to in paragraph (*a*), viz., "the "machinery or plant is sold. . . ." What is meant by "sold" in this context? Is there any ambiguity in the word? I think it is desirable to approach these questions in the first instance without reference to the particular happening which is relied upon in the present case as constituting a "sale."

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[54] [1928] A.C. 143.

[55] [1951] A.C. 161.

[56] [1928] A.C. 143.

[57] [1952] A.C. 401.

[58] [1928] A.C. 143.

My Lords, I feel that the answers must be that the word is unambiguous and denotes a transfer of property in the chattel in question by one person to another for a price in money as the result of a contract express or implied. This is in substance the definition of "sale" given in the second edition of Benjamin on Sale, but for present purposes it is sufficient to emphasize that mutual assent is an essential element in the transaction. It is no doubt true that the contract or agreement to sell may precede the formal instrument or act of delivery under which the property passes, but to describe a transfer of property in a chattel which takes place without the consent of transferor and transferee as a sale would seem to me a misuse of language. By express enactment or by necessary implication from the context any word may be given a meaning different from or wider than that which it ordinarily bears, and this may apply to the word "sale" where it appears in a context relating to the processes of compulsory acquisition of land under the Lands Clauses Consolidation Act, 1845, and other similar enactments. In this context it may well be that, the phrase "compulsory purchase" having become part of the legal vocabulary, such a transaction would be included in the word "sale," but this would not seem to me to justify giving such an interpretation to the word in the context of section 17.

In this connexion the Crown relied upon the decision in *Newcastle Breweries Ld.* v. *Inland Revenue Commissioners*,[59] where the question for decision was whether a sum of £5,309 odd awarded to the company by the War Losses Commission in respect of a quantity of rum taken by the Admiralty under the Defence of the Realm Regulations was a receipt of the company's trade or a profit arising from its trade or business. Although the transaction is sometimes conveniently referred to as a sale, the decision did not involve a consideration of the meaning of this word, and I do not think the case compels me to give to the word a meaning wider than it ordinarily bears so as to include a transaction lacking in one of the essential elements of a sale.

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[59] 96 L.J.K.B. 735.

My Lords, if this be correct it follows that the word "sold" is quite inappropriate to describe the transfer of ownership of the wagons in question from the respondent company to the Transport Commission which occurred automatically by process of law when they vested in the Commission under section 27 of the Transport Act, 1947, without any act of assent by either party. The payment of compensation on the scale provided by the Act cannot be regarded as a sufficient substitute for the contractual element which is lacking.

On this view of the case the provisions of sections 34 and 35 of the Finance Act, 1948, cannot assist the Crown. Both of these sections occur in a part of the Act which is to be construed as one with the Income Tax Acts, and both are to be "deemed always "to have had effect." Section 35 (1) reads as follows: "The "question whether any and if so what balancing allowance or "balancing charge falls to be made to or on the National Coal "Board on the occasion of the transfer to the British Transport "Commission under section 29 of the Transport Act, 1947, of "any railway wagons which the said Board acquired under the "Coal Industry Nationalization Act, 1946, shall be determined "as if section 29 of the Finance Act, 1947, and Schedule VII to "that Act, had not been passed." This section, of course, does not apply to the privately owned wagons with which alone the present appeal is concerned, but it does indicate that the legislature in 1948 envisaged a balancing charge or allowance as arising on a transfer from the Coal Board to the Transport Commission under the Transport Act, 1947. It does not, however, purport to amend the Act of 1945, and the effect of its being deemed always to have had effect is merely to make the section operate retrospectively to the date of the transfer from the Board to the Commission. The circumstances in which a later Act which is to be construed as one with an earlier Act can be used to interpret the language of an earlier statute have been authoritatively dealt with in this House in *Ormond Investment Co. Ld.* v. *Betts.*[60] Lord Buckmaster said: "It is, of course, certain that Parliament "can by statute declare the meaning of previous Acts. It would "be competent for them to do so, even though their declaration "offended the plain language of the earlier Act. It would be an

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[60] [1928] A.C. 143, 154.

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" unnecessary step to take, unless it were intended, contrary to " the general principles of legislation, to make the explanatory Act " retrospective, seeing that the subsequent statute could by independent enactment do what was desired. It is also possible " that where Acts are to be read together, as they are in this " case, a provision in an earlier Act that was so ambiguous that " it was open to two perfectly clear and plain constructions could, " by a subsequent incorporated statute, be interpreted so as to " make the second statute effectual, which is what the courts " would desire to do, and it is also possible that, where a statute " has created a crime or imposed a penalty, a subsequent Act " showing that that crime was intended to have a limited interpretation or the circumstances regarded as narrow in which " the penalty attached, would be used for the purpose of giving " effect to the well known principle of construction to which I " referred at an earlier stage."

My Lords, holding as I do that it is impossible to say of the word " sold " in its present context that it is open to two perfectly clear and plain constructions, it seems to me that section 35 of the Finance Act, 1948, cannot be used to give to the word a wider meaning than it bore when the Act of 1945 was passed.

Section 34 of the Act of 1948 was also relied upon for the same purpose and the same reasoning applies in that case, but I share the view of Upjohn J. that in any event the language of this section would appear to assist the respondent company rather than the Crown.

For these reasons I agree with the conclusions reached by Upjohn J. and the Court of Appeal and would dismiss the appeal.

Appeal dismissed.

Solicitors: *Solicitor of Inland Revenue; Willis & Willis for Taynton & Son, Gloucester.*

[HOUSE OF LORDS.]

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Feb. 10, 14, 15, 16;
Mar. 24.

JOHN SUMMERS & SONS LD. . . . . APPELLANTS;

AND

FROST . . . . RESPONDENT.

Factory—Dangerous machinery—Fencing—Grindstone—Duty to fence—Compliance with Act rendering machine unusable—Factories Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 67), *s.* 14 (1).
Statutory Duty—Breach—Contributory negligence.

By section 14 (1) of the Factories Act, 1937: "Every dangerous "part of any machinery . . . shall be securely fenced unless it is in "such a position or of such construction as to be as safe to every "person employed or working on the premises as it would be if "securely fenced . . ."

A maintenance fitter, while grinding a piece of metal in a factory, injured his thumb by contact with a grinding wheel moving at about 1,450 revolutions a minute. The upper part of the machine was guarded by a fixed hood and at the base there was an adaptable tool rest, but part of the stone was unguarded:—

Held, that in the absence of regulations modifying the requirements of section 14 (1), the duty of the factory owner to fence the grinding wheel securely was an absolute one, and the fact that compliance with them might render the machine unusable did not absolve the factory owner from that duty; and that, since it was not so fenced, there was therefore a breach of the statutory duty giving rise to a right to damages.

Per Viscount Simonds, Lord Morton of Henryton and Lord Reid. Section 60 of the Act enables the Minister by special regulation to modify the absolute obligation of section 14 as regards any particular class of factory.

Davies v. *Thomas Owen & Co. Ld.* [1919] 2 K.B. 39, and *Miller* v. *William Boothman & Sons Ld.* [1944] K.B. 337; 60 T.L.R. 218; [1944] 1 All E.R. 333 approved.

Observations in *Hindle* v. *Birtwistle* [1897] 1 Q.B. 192, 195–6; 13 T.L.R. 129; *Walker* v. *Bletchley Flettons Ld.* [1937] 1 All E.R. 170, 175, and *Mitchell* v. *North British Rubber Co. Ld.*, 1945 S.C.(J.) 69, 73, as to the meaning of "dangerous" machinery approved.

Observations of Lord Thankerton in *Nicholls* v. *F. Austin (Leyton) Ld.* [1946] A.C. 493, 498–9; 62 T.L.R. 320; [1946] 2 All E.R. 92, and of Lord Porter and Lord Normand in *Carroll* v. *Andrew Barclay & Sons Ld.* [1948] A.C. 477, 486, 490–1; 64 T.L.R. 384; [1948] 2 All E.R. 386, as to the meaning of "securely fenced," considered and adopted by Lord Morton of Henryton.

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* *Present*: VISCOUNT SIMONDS, LORD OAKSEY, LORD MORTON OF HENRYTON, LORD REID and LORD KEITH OF AVONHOLM.

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JOHN SUMMERS & SONS LD. *v.* FROST.

Decision of Court of Appeal (sub nom. *Frost* v. *John Summers & Sons Ld.* [1954] 2 Q.B. 21; [1954] 1 All E.R. 901 affirmed.

APPEAL from the Court of Appeal (Birkett and Morris L.JJ., Somervell L.J. dissenting).

This was an appeal from an order of the Court of Appeal dated March 19, 1954, allowing an appeal by the respondent, Albert Harold Frost, from a judgment of Jones J. dated October 21, 1953, whereby he dismissed his action for damages and gave judgment in favour of the appellant company, John Summers & Sons Ld. By the order of the Court of Appeal judgment was entered for the respondent for £261 6s. with costs, leave to appeal to the House of Lords being given.

The facts, stated by Lord Reid, were as follows: The respondent was a fitter with 25 years' experience. On November 27, 1951, he was working on night shift as a maintenance fitter in the appellants' steel works. He had to prepare what was called a "key" from a bar of metal which was about four inches long with a cross section about three-quarters of an inch square. One end of this bar had to be "radiused," i.e., reduced to the shape of a semi-cylinder, and in the course of doing this he used a power-driven grindstone and sustained injury to his thumb in respect of which the present action was brought.

The machine at which he was working was not fully described in the evidence but it consisted of a horizontal shaft, mounted at a convenient height from the ground, driven by an electric motor which could be switched on when required, and carrying at each end of the shaft a circular grindstone or grinding wheel of a diameter of perhaps two feet or less. When set in motion the wheels revolved at a speed of about 1,450 revolutions per minute. When grinding a piece of metal the workman stood facing the edge of the grinding wheel which was moving downwards, and he held the metal against the stone resting it on a substantial rest which was about level with the shaft and adjusted so that there was only a gap of about 3/8ths of an inch between it and the revolving stone. The back and top of the wheel were fenced by a guard in the shape of a hood so that the only part of the revolving stone which was exposed was an arc about seven inches long between the hood and the rest.

When grinding the key the respondent held it on the rest with the axis of the semi-cylinder horizontal and with his two thumbs on the top of the key and not far from the part which he was grinding. To get the required shape he had to rotate the key upwards so that each part of the semi-cylindrical "radius"

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came in turn against the stone. This meant that when he was grinding towards the base of the radius his thumbs would be fairly close to the stone.

The precise way in which the accident happened was not explained. The respondent's view was that the gap between the rest and the stone was too wide and that the key had in some way jammed in this gap, but it was proved that the gap was not too wide and so this jamming could not have happened. It was necessary to hold the metal against the grindstone and it would seem that the key must have slipped in some way while the respondent was holding it against the stone so that his thumb came in contact with the stone. Any contact with a stone revolving at so high a speed would be sufficient to cause the severe laceration of the thumb which the respondent suffered.

The respondent's case at the trial before Jones J. at Chester was based alternatively on negligence or breach of statutory duty. His case on negligence failed and was not now in issue. Jones J. held that there was no breach of statutory duty on the part of the appellants but that the real cause of the accident was the respondent's own negligence. He therefore gave judgment for the appellants. He assessed the damages in the event of the appellants being liable at £261 6s. On appeal the Court of Appeal (Birkett and Morris L.JJ., Somervell L.J. dissenting) held that the appellants were in breach of statutory duty and that the respondent had not been guilty of contributory negligence and accordingly gave judgment for the respondent for £261 6s.

R. H. Forrest Q.C. and *Norman Richards* for the appellant company. On the true construction of section 14 (1) of the Factories Act, 1937, and on the facts of the case the appellant company is not in breach of the subsection or of its duty to the respondent for the following reasons:

(1) Under section 14 (1), if fencing is required, that fencing is necessary only so far as is possible, i.e., only to such an extent as will preserve the identity of the machine by permitting its use. If one encased the grindstone completely it would be impossible to use this grinding wheel and it would cease to be a grinding wheel in any real sense, becoming a museum piece. No grinding wheel is usable at all unless part of the grinding surface is left exposed, and no grinding work could be done if the fence were such as to prevent all foreseeable danger of contact. The legislature cannot have intended to produce this result when they

employed the words "securely fenced," and their meaning must be taken to be so restricted as to allow the machine to work. The requirements of the section are complied with here since by reason of the nature of the operation the safety of the dangerous part cannot be secured by any kind of guard. The proposition that if one cannot fence securely one must not use the machine at all, was first put forward in *Davies* v. *Thomas Owen & Co. Ld.*,[1] but that case is distinguishable and, in any event, the proposition there set out and approved in *Miller* v. *William Boothman & Sons Ld.*[2] is erroneous. So, too, is *Dennistoun* v. *Charles E. Greenhill Ld.*[3] As to the power of the Secretary of State to make regulations, see sections 12, 79 and 83 of the Factory and Workshop Act, 1901. Section 60 of the Act of 1937 gives power to make regulations modifying the Act in certain respects. Regulations so made cannot detract from the Act but may give detailed instructions how its provisions are to be carried out in any particular case. They cannot modify section 14 but throw light on its true construction. No regulations have been made with regard to guarding grindstones. In the House of Lords there have been no decisions on the present point, merely doubts whether *Davies* v. *Thomas Owen & Co. Ld.*[4] was right: *Lewis* v. *Denye.*[5] If, as in *Carroll* v. *Andrew Barclay & Co. Ld.*,[6] one can take practicability into consideration under section 13 of the Act of 1937, there is no reason why it should not be taken into consideration under sections 12 and 14. Bogies are used in factories and are part of the machinery, yet they cannot be fenced, although any workman may step in front of them. The draftsman of the Act obviously had it in mind that there were some machines which could not be securely fenced in the strict sense and yet might still be used; if there were to be a prohibition for them one would have expected it to be expressed. *Fowler* v. *Yorkshire Electric Power Co. Ld.*[7] is only an application of *Davies* v. *Thomas Owen & Co. Ld.*,[8] which was wrongly decided. See also *Atkinson* v. *London and North Eastern Railway Co.*[9] and section 24 (7) of the Act of 1937.

(2) In considering whether a part of a machine is dangerous it must be examined as it stands in the machinery as a whole

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[1] [1919] 2 K.B. 39.

[2] [1944] K.B. 337; 60 T.L.R. 218; [1944] 1 All E.R. 333.

[3] [1944] 2 All E.R. 434.

[4] [1919] 2 K.B. 39.

[5] [1940] A.C. 921; 56 T.L.R. 900; [1940] 3 All E.R. 299.

[6] [1948] A.C. 477, 489; 64 T.L.R. 384; [1948] 2 All E.R. 386.

[7] (1939) 160 L.T. 208; 55 T.L.R. 375; [1939] 1 All E.R. 407.

[8] [1919] 2 K.B. 39.

[9] [1926] 1 K.B. 313; 42 T.L.R. 79.

and not as if it existed or moved in the air or in a vacuum. One cannot just imagine the wheel spinning in the air with nothing round it, detached from the rest of the machine. In the case of a machine which includes a rotating wheel one must look at the wheel in its setting and ask: is there anything dangerous in that machine? Even if in its naked state the wheel would be dangerous it is here securely fenced. Regarding the machine as a whole, the grindstone is guarded by other parts of the machine.

(3) In considering whether part of the machinery is dangerous the proper test is whether it is dangerous to a workman who, subject to the considerations set out in *Caswell* v. *Powell Duffryn Associated Collieries Ld.*,[10] is behaving as a reasonable workman. In *Hindle* v. *Birtwistle*[11] it was said that the question was one of degree, and that one of the matters to be considered was the frequency or otherwise of the shuttle flying out. In the present case it is the frequency of a slip which would bring the man's hand into contact with the wheel. The danger lies in the likelihood of the workman coming into contact with the machine. Employers are not bound to provide against folly: *Walker* v. *Bletchley Flettons Ld.*[12]

(4) In considering whether a dangerous part of machinery is securely fenced the word "securely" has to be given the meaning, not of secure against all possible or foreseeable chances, but of secure against those accidents which are likely to happen to a reasonably careful workman. There is only one way of knowing how a human being may be reasonably expected to act and that is to take a reasonable and not an unreasonable man. Once one gets away from him there is no possible test that can be used. A factory owner must comply with the Factory Acts or else render himself liable to damages or criminal charges. It cannot be right to make him criminally liable for not contemplating the possibility of completely unreasonable conduct on the part of a workman. That would be to put too strong a duty on him. It is true that a reasonable man may get tired and that that must be taken into account. A reasonable man is allowed occasional lapses into thoughtlessness. It is a question of fact to be decided in all the circumstances of the case: see *Higgins* v. *Harrison*[13] and *Stimpson* v. *Standard Telephones and Cables Ld.*[14]

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[10] [1940] A.C. 152; 55 T.L.R. 1004; [1939] 3 All E.R. 722.

[11] [1897] 1 Q.B. 192, 195–6; 13 T.L.R. 129.

[12] [1937] 1 All E.R. 170, 174–5.

[13] (1932) 25 B.W.C.C. 113.

[14] [1940] 1 K.B. 342, 360; 56 T.L.R. 90; [1939] 4 All E.R. 225.

(5) In considering whether a part of a machine is (a) dangerous and (b) securely fenced the court should have regard only to the evidence, including evidence on these three matters: (a) the class of workman operating the machine; (b) the frequency or otherwise of accidents and (c) the opinion of the appropriate Minister and of Her Majesty's inspectors of factories. On the first two matters the evidence is in favour of the appellant company. This was an experienced workman and accidents were not frequent. On the third point reliance is placed on *Carr* v. *Mercantile Produce Co. Ld.*[15] and *Higgins* v. *Harrison.*[16] The legislature by incorporating and continuing in the Act of 1937 the regulations governing the process of grinding in force under and by virtue of the Act of 1901, by necessary implication approved the continued use of grindstones as then and now guarded and used. It has never been suggested that section 60 of the Act of 1937, giving the Minister power to make regulations, includes a power to lay down a lower standard of care than the Act prescribes. Whether this is so or not, there was no such power under the Act of 1901. When the Woodworking Machinery Regulations, 1922, were made the Minister cannot have thought that he was modifying the Act, and accordingly he was not purporting to lower its standards but to set them out. See also the Grinding of Metals (Miscellaneous Industries) Regulations, 1925, and the Grinding of Metals (Miscellaneous Industries) (Amendment) Special Regulations, 1950. These do not tell employers how to guard grindstones, though it appears that the Minister considered the possibility of men being employed on mechanically driven grindstones.

(6) In any event, the respondent's injuries were the result of his own negligence. The judge, who found that the respondent was setting about the job in the wrong way, had seen him give a demonstration. While giving full value to *Flower* v. *Ebbw Vale Steel, Iron and Coal Co. Ld.*[17] and *Caswell* v. *Powell Duffryn Associated Collieries Ld.*,[18] no damages should be awarded here or only a very small proportion of those assessed. The argument that if the machine had been fully fenced the accident could not have happened could be put forward in any case. One should take a fair, broad and simple view in the light of what is just and equitable: see *Cakebread* v. *Hopping Brothers (Whetstone) Ld.*[19];

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[15] [1949] 2 K.B. 601; 65 T.L.R. 503; [1949] 2 All E.R. 531.

[16] 25 B.W.C.C. 113.

[17] [1934] 2 K.B. 132.

[18] [1940] A.C. 152.

[19] [1947] K.B. 641; 63 T.L.R. 277; [1947] 1 All E.R. 389.

Pugh v. *Manchester Dry Docks Co. Ld.*,[20] and the Law Reform (Contributory Negligence) Act, 1945.

One is not here dealing with a new or complicated machine like an automatic drill or saw. This is a very old type of tool common when the first Factory Acts came into force and one capable of causing injury. This argument proceeds on the basis that this grindstone was guarded as well as it could be. An employer can do no more when he has put on every possible guard and a workman with " perverted ingenuity " injures himself: see *Carr* v. *Mercantile Produce Co. Ld.*[21]

Norman Richards following. *Beal* v. *E. Gomme Ld.*[22] is a fencing case in which the greater proportion of the blame was apportioned to the workman. As to the extent of the Minister's power to make regulations under section 60 of the Act of 1937 which, it is said, may modify the Act, the actual decision in *Miller* v. *William Boothman & Sons Ld.*[23] may be right, though the ratio decidendi suggesting that the Act can be modified is wrong. The right test of whether machinery is dangerous is laid down in *Walker* v. *Bletchley Flettons Ld.*[24] Any part of a machine can be dangerous in some circumstances. In many factories there is grease on the ground and a passer-by may slip against a machine. If the respondent's argument were right one would have to guard every part of a machine that was a possible cause of injury, every corner against which a man might strike.

R. Marven Everett Q.C. and *Geraint Rees* for the respondent. *Whitby* v. *Burt, Boulton & Hayward Ld.*[25]; *Hutchinson* v. *London and North Eastern Railway Co.*[26]; *Smith* v. *Chesterfield and District Co-operative Society Ld.*,[27] and *Cakebread* v. *Hopping Brothers (Whetstone) Ld.*[28] illustrate that in the matter of contributory negligence one must take a broad view of all the circumstances; it is hard to assess blameworthiness under the Act of 1937. On the question of negligence the respondent's contentions are substantiated by the evidence, and on the authorities either his act was not of such a quality as to rank as negligence or else a high proportion of the blame should rest on the appellant company.

On the facts the gap here was very wide for the piece of metal that was being worked on. There could have been an adjustable guard. The right conclusion is that the machine was dangerous and was not securely fenced. There is a strong current of authority against the appellant company.

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[20] [1954] 1 W.L.R. 389; [1954] 1 All E.R. 600.

[21] [1949] 2 K.B. 601, 608.

[22] (1949) 65 T.L.R. 543.

[23] [1944] K.B. 357.

[24] [1937] 1 All E.R. 170, 175.

[25] [1947] K.B. 918; 63 T.L.R. 458; [1947] 2 All E.R. 324.

[26] [1942] 1 K.B. 481; 58 T.L.R. 174; [1942] 1 All E.R. 331.

[27] [1953] 1 W.L.R. 370; [1953] 1 All E.R. 447.

[28] [1947] K.B. 641.

In considering whether a dangerous part of a machine is securely fenced, evidence of what the Minister or the factory inspectors thought is neither relevant nor admissible. *Carr* v. *Mercantile Produce Co. Ld.*[29] and *Higgins* v. *Harrison*,[30] relied on by the appellant company, were wrong on this point. *Lyon* v. *Don Brothers, Buist & Co. Ld.*[31] deals with the weight of such evidence. See also *Hollington* v. *F. Hewthorn & Co. Ld.*[32]

The pattern of this legislation from 1901 onwards has been to provide two classes of duty, one absolute and the other qualified, but giving the Minister power to modify the absolute duty where he considered it necessary and reasonable: see the Threshing Machines Act, 1878; the Factory and Workshop Act, 1878, s. 8, and the Chaff Cutting Machines (Accidents) Act, 1897. The Act of 1901 introduced a new conception in regard to fencing (see sections 10 (1) (*c*) and 17). The Acts of 1901 and 1937 and the Factories Act, 1948, show an all-embracing policy fully covering the absolute duties imposed and giving the executive power to deal with any particular plant by Order. Thus, until the appropriate regulations were made it would have been illegal to use a circular saw or a horizontal milling machine: see Woodworking Machinery Regulations, 1922, regulation 10 (*c*), and Horizontal Milling Machines Regulations, 1928, regulation 3. This inference is drawn from the proviso to each of the Regulations and from the fact that if the argument for the appellant company is right they were quite unnecessary. The words "so far as is practicable" cannot be imported into the relevant provisions of the Act. The duty imposed thereby is so to fence the dangerous parts of the machinery as to prevent contact between the workman and the part required to be fenced. Section 14 (1) of the Act of 1937 requires protection for everyone employed or working on the premises.

Under section 14 (1) the matters to be considered are (1) whether a part of a machine is dangerous and ought to be fenced, having regard to the foreseeability of accident; (2) whether it is in fact securely fenced, the test here being simple and objective and no question of foreseeability arising, and (3) alternatively, whether it is in such a position and of such a nature as to be as safe as if it were securely fenced. The exact language of the proviso to the subsection is also important. In considering these questions the House should not be unduly impressed by the danger of prosecution run by employers. Prosecutions are only initiated by the appropriate Government Department as a matter of policy; they do not occur when people are doing their best.

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[29] [1949] 2 K.B. 601.

[30] 25 B.W.C.C. 113.

[31] 1944 S.C.(J.) 1, 5–6.

[32] [1943] 1 K.B. 587, 593; [1943] 2 All E.R. 35.

On the true construction of section 14, once it has been held that a part of machinery is dangerous the duty to fence is absolute and unqualified, subject to the provisions of the section and of sections 15 and 16. The mere fact that a person is injured by coming into contact with a dangerous part shows that it is not securely fenced, because it must be fenced against all dangers, whether foreseeable or not. On this point foreseeability is not the test. It is in considering whether the part is dangerous that it is relevant to consider whether or not a workman's act is one of "perverted ingenuity." This does not enter into the question whether or not fencing is secure, for one must always remember that it is not the careful workman who needs statutory protection which is directed to human frailty. Even if compliance with the requirements of the provisions of section 14 makes it commercially impracticable or mechanically impossible to use the machine, yet they must be complied with unless special regulations have been made by the Minister under the powers conferred on him by section 60. Those powers are wider than the powers conferred by section 14 (2).

Foreseeability involves foreseeing almost everything. The duty here imposed is absolute, subject to the power to make regulations.

The respondent relies on *Burns* v. *Joseph Terry & Sons Ld.*,[33] *Miller* v. *William Boothman & Sons Ld.*[34] and *Hindle* v. *Birtwistle.*[35] See also *Carroll* v. *Andrew Barclay & Sons Ld.*[36]; *Sowter* v. *Steel Barrel Co. Ld.*[37]; *Atkinson* v. *London and North Eastern Railway Co.*[38]; *Mackay* v. *Ailsa Shipbuilding Co. Ld.*[39]; *Mitchell* v. *North British Rubber Co. Ld.*[40]; *Coltness Iron Co. Ld.* v. *Sharp*[41]; *Richard Thomas & Baldwins Ld.* v. *Cummings*[42];

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[33] [1951] 1 K.B. 454, 465, 468; [1951] 1 T.L.R. 349; [1950] 2 All E.R. 987.

[34] [1944] K.B. 337.

[35] [1897] 1 Q.B. 192, 195.

[36] [1948] A.C. 477, 485–6.

(1935) 99 J.P. 379.

[38] [1926] 1 K.B. 313.

[39] 1945 S.C. 414.

[40] 1945 S.C.(J.) 69, 73.

[41] [1938] A.C. 90, 93, 95; 53 T.L.R. 978; [1937] 3 All E.R. 593.

[42] Ante, 321; [1955] 1 All E.R. 285.

Benn v. *Kamm & Co. Ld.*[43]; *Dickson* v. *Flack*[44]; *Lyon* v. *Don Brothers, Buist & Co. Ld.*[45]; *Carr* v. *Mercantile Produce Co. Ld.*[46]; *Caswell* v. *Powell Duffryn Associated Collieries Ld.*[47]; *Galashiels Gas Co. Ld.* v. *Millar.*[48] See further Operations at Unfenced Machinery Regulations, 1938 and 1946.

Examples of absolute duties imposed by the Act of 1937 are found in sections 12, 13, 14, 17, 20 and 22 (1); examples of qualified duty are found in sections 18, 19 (3), 22 (4), 23 (1) (*a*), 25 (3), 26 and 47.

Geraint Rees following. As to the laying of Regulations before Parliament, see the note on section 129 of the Act of 1937 in Redgrave's Factories, Truck and Shops Acts, 18th ed., pp. 336–7. As to the power to "modify" the Act by regulations, contrast section 60 (2) (*c*) of the Act of 1937 and section 83 (*c*) of the Act of 1901.

The respondent was a skilled and careful workman employing a method frequently used before. He was not, on the evidence, acting irregularly or guilty of contributory negligence. If the appellant company had fulfilled the statutory duty to fence, this accident could not have happened.

R. H. Forrest Q.C. in reply. The wheel was properly guarded. On the evidence the gap was not too large, and on the respondent's own evidence the position of the guard had nothing to do with the accident.

In passing this legislation it cannot have been the intention of Parliament to prohibit the use of grindstones. If it had meant to do that there were simpler ways of doing so.

Neither the Act of 1901 nor that of 1937 gave the Minister power to relax the provisions made by statute. Parliament did not put in words of prohibition with a power to relax them. In the Woodworking Machinery Regulations, 1922, there was no relaxation, only definition.

The respondent's whole argument was based on the false assumption that the object of the Act was to protect, not only the careful but also the careless, indolent and disobedient workman. The Act of 1878 was passed at a period when if a man was not prepared to take risks in a factory there were plenty more who would. It must be considered in that light. The Factory

[43] [1952] 2 Q.B. 127; [1952] 1 T.L.R. 873; [1952] 1 All E.R. 833.

[44] [1953] 2 Q.B. 464; [1953] 2 All E.R. 840.

[45] 1944 S.C.(J.) 1, 5.

[46] [1949] 2 K.B. 601, 608.

[47] [1940] A.C. 152, 166.

[48] [1949] A.C. 275; 65 T.L.R. 76; [1949] 1 All E.R. 319.

Acts were designed to prevent slave-driving. They might protect the tired man or the man whose attention had slipped but not the disobedient or idle workman. The provisions of the Act of 1878 (section 5 as to fencing and section 8 as to fixing grindstones) indicate that grindstones could be used legally. If the duty under the Act of 1901 had been intended to be absolute one would have expected clear words to be used, since Parliament must have had in mind the existence of grindstones which were being used legally under the Act of 1878: see section 88 and Schedule III of the Act of 1901. The inspectors of factories must have known of their existence: see the Woodworking Machinery Regulations, 1922, the proviso to the Regulations. Under those Regulations the Minister was not substituting different rules for those laid down by the Act. All he was doing was defining the duties; one still had to comply with the Act.

Practicability is the test, not only in estimating danger but also as regards fencing: see *Carroll* v. *Andrew Barclay & Sons Ld.*[49] and *Smithwick* v. *National Coal Board.*[50] In that connexion it is of value to see how the inspectors of factories have treated the matter. A fully fenced grindstone would cease to be a grindstone. One must distinguish between the case in which it is alleged that fencing would be expensive and would slow up production and the case where if the machine were fully fenced its identity would be destroyed.

Smith v. *Chesterfield and District Co-operative Society Ld.*[51] and *Cakebread* v. *Hopping Brothers (Whetstone) Ld.*[52] were relied on by the respondents on the question of contributory negligence, but in neither case could it be said that the employers were free from blame. But here the appellant company is free from blame and found favour with the judge of first instance and one member of the Court of Appeal.

Their Lordships took time for consideration.

March 24. VISCOUNT SIMONDS. My Lords, I have had the privilege of reading the opinion which my noble and learned friend, Lord Reid, will deliver and am so fully in agreement with it that I propose to make only a few short observations myself. I have come with reluctance to the conclusion that this appeal must be dismissed, for I cannot fail to be impressed by the inconvenience of a decision which may for the time being make it impossible to work a machine which has for long been in popular use without (so far as is known) any adverse report by Her Majesty's Inspectors of Factories or any administrative measure designed to safeguard its use. Fortunately, as I shall indicate, the matter can be remedied and, as the judgment of the Court of Appeal which is to be affirmed was delivered a year ago, it may be assumed that the necessary steps are already in contemplation.

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[49] [1948] A.C. 477, 489, 493.

[50] [1950] 2 K.B. 335, 346; [1950] 2 T.L.R. 173.

[51] [1953] 1 W.L.R. 370.

[52] [1947] K.B. 641.

My Lords, section 14 of the Factories Act, 1937,‡ and its predecessor, section 10 of the Factories Act, 1901, have on many occasions been discussed in the courts and I think that their true construction is not in doubt. In particular I think it is clear that the obligation imposed by the section to fence securely every dangerous part of any machinery, except as in the section mentioned and subject to its proviso, is an absolute obligation. And by that I mean that it is not to be qualified by such words as " so far as practicable " or " so long as it can be fenced con- " sistently with its being used for the purpose for which it was " intended " or similar words. I come to this conclusion for the following reasons which will be elaborated by my noble and learned friend.

First, it appears to be to be an illegitimate method of interpretation of a statute, whose dominant purpose is to protect the workman, to introduce by implication words of which the effect must be to reduce that protection.

Secondly, where it has been thought desirable to introduce such qualifying words, the legislature has found no difficulty in doing so. This can be found both in other statutes, of which I need give only one out of many possible examples, viz., Chaff-Cutting Machine (Accidents) Act, 1897 (60 & 61 Vict. c. 60), which, in providing for the fencing of chaff-cutting machines, uses the words " so far as is reasonably practicable and consistent with " the due and efficient working of the machine " (section 1), and also in other sections of the statute now under consideration. For

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‡ Factories Act, 1937, s. 14: " (1) Every dangerous part of any " machinery, other than prime movers " and transmission machinery, shall " be securely fenced unless it is in " such a position or of such con- " struction as to be as safe to every " person employed or working on the " premises as it would be if securely " fenced: Provided that, in so far as " the safety of a dangerous part of " any machinery cannot by reason of " the nature of the operation be " secured by means of a fixed guard, " the requirements of this subsection " shall be deemed to have been com- " plied with if a device is provided " which automatically prevents the " operator from coming into contact " with that part."

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instance, in different forms qualifying words are to be found in sections 18, 19 and 22, and no doubt in many other sections.

Thirdly, it was decided as long ago as 1919 in *Davies* v. *Thomas Owen Co. Ld.*[1] that the obligation imposed by the comparable section 10 of the Factories Act, 1901, was absolute and that, if the result of a machine being securely fenced was that it would not remain commercially practicable or mechanically possible, that did not affect the obligation: the statute would in effect prohibit its use. This had been for 17 years the unchallenged law when the Act of 1937 was passed, and that Act by section 14 substantially repeated the former section. It would be contrary to well-established principles of construction to give a different meaning to the new section: see *Barras* v. *Aberdeen Steam Trawling and Fishing Co. Ld.*[2]

Fourthly, the proviso to section 14 (1) affords a strong indication that the substantive part of it imposes an absolute obligation: for, unless its effect is absolutely to prevent the operator from coming into contact with a dangerous part of the machine, there would be little meaning in the provision of an alternative which has just that effect.

Fifthly, the absolute obligation imposed by section 14 (1) is subject to the regulation-making power of the Minister under section 60. I do not think it necessary to decide whether the Act of 1901 contained a similar power. But in my opinion it is clear that section 60 of the 1937 Act enables the Minister by special regulation to modify the absolute obligation of section 14 in regard to such classes or descriptions of factory as he thinks fit. Reading the section as a whole, I do not regard the words "subject to the provisions of this Act" as qualifying the power of modification but rather as looking forward to section 129. There is thus a consistency in the Act—first a provision for the safety of the workman which is absolute, and secondly a recognition that such a provision may render a particular industrial process practically impossible, and therefore a power in the Minister, if he thinks fit and subject always to the power of Parliament to annul the regulation, to relax the rigour of the absolute obligation.

For these reasons I think that the obligation to "securely "fence" the machinery here in question is unambiguously absolute and will remain absolute unless and until the Minister makes appropriate regulations.

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[1] [1919] 2 K.B. 39.

[2] [1933] A.C. 402; 49 T.L.R. 391.

The next question is what is the test or standard of secure fencing. I agree with my learned and noble friend, Lord Reid, that, since the danger to be guarded against is contact with the exposed part of the grindstone while it is in motion, that fencing is secure which effectively protects the workman from that danger. By " workman " in this context I mean not only the actual operator but also any other person employed on the premises. Your Lordships have been referred to a number of formulae and I do not wish to add to their number. It is elementary that it is necessary to consider not only the risk run by a skilled and careful man who never relaxes his vigilance. An observation of the late Lord du Parcq (then du Parcq J.) in *Walker* v. *Bletchley Flettons Ld.*[3] to the effect that a machine is dangerous " if it is a possible cause of injury to anybody acting " in a way in which a human being may be reasonably expected " to act in circumstances which may be reasonably expected to " occur " has been sometimes mentioned with approval, and I think that it gives as precise a direction as can be hoped for if it is read in conjunction with what Lord Cooper said in *Mitchell* v. *North British Rubber Co. Ld.*,[4] viz., that a machine is danger- " ous if in the ordinary course of human affairs danger may " reasonably be anticipated from its use unfenced, not only to the " prudent, alert and skilled operative intent upon his task, but " also to the careless or inattentive worker whose inadvertent or " indolent conduct may expose him to risk of injury or death from " the unguarded part." So long as this element of danger exists the machine is not securely fenced.

But whatever test is adopted, there will be borderline cases, and it is sufficient for this case for me to say that I can think of no standard of security which would justify the employers in leaving the rotating grindstone unfenced to the degree to which it was exposed in this case.

There remains this question. The employers being guilty of a breach of statutory duty and the workman having suffered damage which was assessed by the learned judge at £261 6s., was he guilty of contributory negligence and, if so, should there be any and what apportionment of the damage? The learned judge came to the conclusion that " there really was nothing wrong with this " machine; that it was a perfectly safe machine to use, guarded " as it was with a guard above and the rest below, if a person " used it in the proper way . . . and that the real cause of the

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[3] [1937] 1 All E.R. 170, 175.

[4] 1945 S.C.(J.) 69, 73.

"accident was, unfortunately, the plaintiff's own negligence." The learned judge saw the witnesses and the accident was illustrated to him and his opinion must be weighty. But in the Court of Appeal Birkett L.J. thought that the plaintiff was not doing anything wrong or stupid or forbidden in using the grindstone, and Morris L.J. said that he was not acting in a deliberately foolhardy way and concluded that, while some measure of criticism could forcibly be suggested, any deficiencies or failures on the plaintiff's part fell far short of negligent conduct. Having carefully read all the evidence, I think that the learned Lords Justices were well justified in drawing these inferences and I agree with them. No question therefore of apportionment of the damage arises.

LORD OAKSEY. My Lords, I agree with my noble and learned friend on the Woolsack that the appellants have been shown to be guilty of a breach of statutory duty and that so far this appeal fails.

On the question of the respondent's contributory negligence, however, I think the finding of the learned judge should not be disturbed. He and he alone saw the respondent demonstrate what he did at the time of the accident. The respondent's case was that there was an improper gap between the rest and the wheel, not that the exposed part of the wheel was in itself dangerous apart from the alleged gap. The learned judge found that there was no improper gap but that, in performing the grinding operation on a rest which was close to the wheel, the respondent was guilty of negligence. The trial judge was obviously in a better position to decide that question than a Court of Appeal, and I think, therefore, that the appeal should be allowed on the question of damages, which should be borne equally by the parties.

LORD MORTON OF HENRYTON. My Lords, in certain cases which have been cited to your Lordships the court has asked itself the question—Was the machine under consideration, regarding it as a whole and in its actual state at the time of the accident, a "dangerous machine"? The words "dangerous machine" are not used in the section now under consideration—section 14 of the Factories Act, 1937—nor are they used in any one of the group of sections which include section 14. If I had thought that this question arose in the present case, I should have answered it in the negative. The only dangerous part of the machine is the grinding wheel, and that part is so fenced in that only an arc about seven inches long is exposed. A substantial rest is provided upon which the piece of metal to be ground is held by the workman. The respondent himself said in evidence that he had used stones for 25 years and had never had an accident before, and that the machine in question was used normally by everyone for all kinds of work, heavy or light. Mr. Martin, an expert witness called on behalf of the respondent, said that the machine was a perfectly normal machine and was "guarded so far as is practicable to allow the machine to be "used at all" and that it was a machine which any skilled fitter should be able to use without hesitancy if it was properly adjusted. The learned judge held that it was properly adjusted, and it has not been suggested that this finding was wrong. Moreover, the wheel is only in motion while a workman is using it, so there is no danger to any other workman.

In my opinion, the question whether this machine, regarding it as a whole, was a dangerous machine does not arise at all, but I believe I am alone in so thinking. Your Lordships are, I think, all of opinion that this question does arise and have, in effect, answered it in the affirmative. In these circumstances I think it is only fair to the appellants to say that if I had thought that the question arose I should have taken a different view, in agreement with Somervell L.J. (as he then was), and Jones J., who tried the action. I refrain from elaborating the point, and pass from it with this quotation from the judgment of Wills J. in *Hindle* v. *Birtwistle*[5]: "No doubt it would be impossible to "say that because an accident had happened once therefore the "machinery was dangerous."

I now turn to the questions which do arise, in my opinion, in regard to the alleged breach of statutory duty by the appellants. Section 14 (1) of the Factories Act, 1937, is as follows: [His Lordship read the subsection and continued:] As I read the section, only two questions arise upon it in the present case. They are: (1) Was the grinding wheel a "dangerous part" of the power-operated grinding machine at which the respondent was working, within the meaning of section 14 (1) of the Act? (2) If so, was that wheel "securely fenced," within the meaning of the same section, at the time when the accident occurred? If the answer to the former question is "Yes" and to the latter question "No," the appellants have been guilty of a breach of statutory duty, and it will become necessary to decide whether there was or was not contributory negligence on the part of the respondent.

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[5] [1897] 1 Q.B. 192, 195; 13 T.L.R. 129.

In my opinion, in order to answer the first question stated above, one must disregard for the moment such protection as has been provided, and consider only the wheel itself, which is a *part* of the machinery, operated by the power which can be turned on or off by any person at will, and revolving at 1,450 revolutions a minute. So regarding it, the wheel is undoubtedly a dangerous part—and, indeed, the only dangerous part—of the machine now under consideration.

Question (2) turns on the meaning of the words "securely "fenced" in section 14 (1). The word "fenced" raises no difficulty, but various meanings of the word "securely" have been suggested in argument. I shall first approach this question by a consideration of the words of the section, apart from any authority.

My Lords, to my mind the natural meaning of the word "securely," used in regard to the fencing of a dangerous part of a machine, is that the part must be so fenced that no part of the person or clothing of any person working the machine or passing near it can come into contact with it. Nor can I find any context in the subsection which should lead the reader to give to this word any meaning other than that which it would naturally bear. The words "unless it is in such a position or of such construction as "to be as safe to every person employed or working on the premises as it would be if securely fenced" seem to me to support this meaning, and the words of the proviso seem to place the matter beyond doubt. If safety cannot be secured by means of a fixed guard, the proviso offers an alternative in the form of a device which "automatically prevents the operator from coming "into contact with that part." The proviso refers only to the operator, but the earlier part of the section makes it plain that in cases not coming within the proviso the protection is intended to cover every person employed or working on the premises.

The meaning of the words "securely fenced," in a similar context, was recently considered by this House in *Carroll* v. *Andrew Barclay & Sons Ld.*[6] That case turned on the construction of the words "every part of the transmission machinery shall "be securely fenced" in section 13 (1) of the Factories Act, 1937, and the question was whether the words "securely fenced" imposed a duty on the employers to erect an enclosure which would prevent broken parts of a machine from flying out or injuring an employee; but the following passages from the speeches have a direct bearing upon the present question. Lord Porter said [7]: "Fencing, in my opinion, means the erection of a "barricade to prevent any employee from making contact with "the machine, not an enclosure to prevent broken machinery "from flying out." Lord Normand said [8]: "It is common "ground that the crucial words are 'securely fenced' and that "they must have the same meaning wherever they occur in the "statute," and [9]: "The proviso to section 14 (1) makes it clear "that whereas the best form of fencing for dangerous parts of a "machine is a fixed guard, yet the obligation to fence will in "defined cases be deemed to be complied with if a device is pro- "vided which automatically prevents the operator from coming "into contact with that part. The difference between the fence "prescribed by the substantive part of the subsection and the "device is not that one is a fence and the other is not, but that "the device is a fence which protects only the operator and not "every person employed or working on the premises. It is, "therefore, necessary to say that it shall be deemed to be com- "pliance with the requirements of the subsection. But the kind "of protection which is given to the operator by the device is the "same kind of protection as that given to every person employed "or working on the premises by the prescribed fence or guard, "and it is protection against contact." There are passages in my own speech to the same effect.

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[6] [1948] A.C. 477; 64 T.L.R. 384; [1948] 2 All E.R. 386.

In *Nicholls* v. *F. Austin* (*Leyton*) *Ld.*[10] Lord Thankerton said: "At the trial, the first point argued before the learned "judge was whether the obligation to fence imposed by sub- "section (1) of section 14, is an obligation not only to protect "against direct injury by contact with the machine, but also "against indirect injury from something that flies off from the "machine." Later he said [11]: "My Lords, on consideration of "the terms of section 14, I am of opinion that there is a simpler "answer to the contention of the appellant, namely, that the "obligation to fence imposed by subsection (1) is an obligation to "provide a guard against contact with any dangerous part of the "machine, and that it does not impose any obligation to guard "against dangerous materials or articles ejected from the machine "in motion." What is contemplated, in my view, is that there shall be complete protection against contact for every person employed or working on the premises in cases not coming within the proviso, and complete protection against contact for the operator in cases coming within the proviso. In using the words " complete protection " I do not suggest that the fence must be so constructed that it cannot be climbed over, or broken down, by an employee who is determined to get at the machinery. That would be demanding the impossible from the employers, and I should not have thought the point worthy of mention if it had not arisen in the course of the argument.

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[7] [1948] A.C. 477, 486.

[8] Ibid. 488.

[9] Ibid. 490–1.

[10] [1946] A.C. 493, 498; 62 T.L.R. 320; [1946] 2 All E.R. 92.

[11] [1946] A.C. 493, 499.

I shall be referring briefly to the earlier authorities dealing with the words " securely fenced," in the course of considering an interesting argument addressed to your Lordships by counsel for the appellants. For the moment, I need only say that I can find nothing in these authorities to throw doubt upon the view which I have just stated.

Mr. Forrest, for the appellants, could not, of course, dispute that if the words " securely fenced " were construed as I have just construed them, the appellants had failed securely to fence the grinding wheel and had thus committed a breach of the obligation imposed by section 14 (1) of the Act. He pointed out, however, that, according to the uncontradicted evidence of an expert at the trial, " It " (i.e., the grinding wheel) " is guarded " as far as is practicable in order to allow the machine to be used " at all," and he contended that the obligation imposed by section 14 (1) was only an obligation to fence to such an extent as will preserve the identity of the machine by permitting its use. " If," said he, " you cannot use the wheel, it ceases to be a " grinding wheel in any real sense and becomes merely a museum " piece."

My Lords, I have felt, and still feel, great sympathy with this argument, but I feel unable to accede to it. The wording of the section places no limitation upon the words " securely " fenced." An absolute obligation is imposed and I am impressed by the fact that in a number of sections of the Act the duties imposed are qualified by the insertion of the words " so " far as is reasonably practicable " or other words to the same effect. See, for example, section 18 (1), section 19 (3), section 22 (4), section 25 (3), section 26 (1) and (2) and section 47. On the other hand, in the section now under consideration and in many other sections no such qualification is inserted. The contrast is strikingly illustrated in section 25, for the obligation is absolute in subsections (1), (2) and (4) and qualified in subsection (3).

Counsel is really asking your Lordships to substitute for the words " shall be securely fenced " some such words as " shall " be fenced as securely as is practicable but not so as to prevent " use of the machinery "; but that would be legislation, not interpretation of the words of the statute.

There is another serious difficulty in the way of the appellants. In *Davies* v. *Thomas Owen & Co. Ld.*[12] Salter J. had to consider the meaning of the words " securely fenced " in section 10 (1) (*c*) of the Factory and Workshop Act, 1901, which was substantially to the same effect as the subsection now under consideration. The jury's answers to certain questions amounted, as the judge held, to a finding that to fence securely the dangerous parts of a pressing and finishing machine was " commercially and mechanically impracticable." Thus, the judge was faced with the same problem as that which now confronts your Lordships' House. He said[13]: " . . . with regard to " the issue of breach of statutory duty in my opinion the plaintiff " succeeds. The obligation imposed by the Factory and Work- " shop Act, 1901, in relation to the fencing of dangerous " machinery, is absolute. It is an obligation not merely to " fence, but to fence securely. The statute does not say that " dangerous machinery shall be securely fenced if that is com- " mercially practicable or mechanically possible. If a machine " cannot be securely fenced while remaining commercially prac- " ticable or mechanically useful the statute in effect prohibits its " use. The words of section 10 (1) (*c*) are not that dangerous " machinery is to ' be in such position or of such construction " ' as to be equally safe . . . as it would be if it were fenced ' " but is to ' be in such position or of such construction as to be " ' equally safe . . . as it would be if it were *securely* fenced.' " The workman is entitled to have secure fencing in fact and the " findings of the jury show that this machine was not securely " fenced. The observations of the jury to the effect that secure " fencing is commercially and mechanically impracticable are " irrelevant, and I think that the plaintiff has proved a breach " of a statutory duty and damage caused to him thereby."

The view which Salter J. took on that occasion was approved and followed in several cases between 1919 and 1937. Yet the legislature, in framing the Factories Act, 1937, reproduced the

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[12] [1919] 2 K.B. 39.

[13] Ibid. 41–2.

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words "securely fenced" in section 14 of that Act, which took the place of section 10 of the 1901 Act. Again, between 1937 and 1948, the view of these words which had been taken by Salter J. was affirmed by the Court of Appeal in *Miller* v. *William Boothman & Sons Ld.*[14] and by the Court of Session in *Mackay* v. *Ailsa Shipbuilding Co. Ld.*[15] The Factories Act, 1948, was passed "to amend the Factories Act, 1937" (see the title) but again the legislature did not think fit to alter the words "securely fenced" in section 14 (1) of the Act of 1937. This is a circumstance to which this House has attached great weight. I need only refer by way of example to Lord Loreburn's observation in *North British Railway Co.* v. *Budhill Coal and Sandstone Co.*[16]: "When an Act of Parliament uses a word which has "received a judicial construction it presumably uses it in the "same sense," and to the speech of Lord Buckmaster in *Barras* v. *Aberdeen Steam Trawling and Fishing Co. Ld.*[17]

For these reasons I am of opinion that the grinding wheel was not "securely fenced" within the meaning of section 14 (1) of the Act of 1937 and thus the appellants have failed to fulfil the duty which the statute lays upon them.

I am acutely conscious of the regrettable results which may follow if your Lordships are of this opinion, but section 60 of the Act of 1937, the successor of section 83 of the Act of 1901, provides a means whereby the Secretary of State can modify the provisions of section 14 if he is satisfied of certain matters. An example of such a modification, under the Act of 1901, is afforded by the Woodworking Machinery Regulations, 1922, which were under consideration in the case of *Miller* v. *William Boothman & Sons Ld.*[18] already cited. In giving the judgment of the Court of Appeal in that case Lord Goddard (then Goddard L.J.) said: "If section 14 (1) stood alone, in our opinion, the "obligation would be absolute. The section itself does not admit "of exceptions. It does not say that a dangerous machine is to "be fenced as securely as possible or only so far as will leave it "commercially or mechanically useful." Thus, as I have already stated, the Court of Appeal affirmed the view taken by Salter J. in 1919. After referring to the proviso to section 14 (1) and to other provisions of the Acts of 1901 and 1937, Lord

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[14] [1944] K.B. 337; 60 T.L.R. 218; [1944] 1 All E.R. 333.

[15] 1945 S.C. 414.

[16] [1910] A.C. 116, 127; 26 T.L.R. 79.

[17] [1933] A.C. 402; 49 T.L.R. 391.

[18] [1944] K.B. 337, 339.

Goddard continued [19]: "The object of the legislature in giving "power to the Secretary of State to modify the provisions of the "Act in respect of safety requirements would seem to be that it "was recognized that there are some machines necessary for "modern industry that cannot be completely fenced if they are "to be used, and circular and band saws afford good illustrations. "From the evidence in the present case it seems that, at any "rate down to the date of the trial, no guard had been invented "which would afford completely secure fencing for these saws. "Some part of the cutting edge must be exposed or the wood "could not be cut. Accordingly, if the prohibition of section 14 "is absolute the use of these saws in a factory inevitably renders "the owners liable to penalties, and it must follow that they "cannot be used at all. It is unnecessary to emphasize the "seriousness of such a result. It was, in our opinion, for this "very reason that in 1922 the Secretary of State made the "Woodworking Machinery Regulations. These regulations were "made under the Act of 1901, sections 79, 82 and 83 being the "relevant sections. By section 159 of the Act of 1937 these "regulations continue in force, notwithstanding the repeal of the "earlier Act, and have effect as though made under the present "Act, that is, under section 60. They contain detailed pro"visions in regulation 10 for the guarding of circular saws, hand "saws and planing machines. In our opinion, these regulations "must be regarded as modifying the provisions of section 14 in "respect of these machines and of substituting the prescribed "guarding and fencing for the absolutely secure fencing which "the section would otherwise require. It is difficult, indeed, to "see what other object these regulations could have. They "clearly contemplate the use of these saws. If saws are securely "fenced as required by section 14 they could not be dangerous "to life or limb, and, indeed, could not be used at all. The use "in section 60 (1), of the words 'as appear to him to be reason"'ably practicable and to meet the necessity of the case' we "think clearly shows that it is intended to give the Secretary of "State power to modify the otherwise absolute obligation so as "to allow the use of the machine, provided that reasonable, "though not absolute, provision for safety is made." With these observations I entirely and respectfully agree.

It may be that the principle which the legislature had in mind when enacting section 10 of the Act of 1901 and section 14 of the Act of 1937 was this: that prima facie the protection of workmen against any possibility of contact with dangerous machinery should be absolute and unqualified, and any modification of the strict rule which might be necessary to enable any particular machine to be worked should be brought into effect by special regulations designed to meet the particular case.

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[19] [1944] K.B. 337, 340–1.

I cannot attribute any moral blame to the appellants for their breach of statutory duty, as I do not doubt that they believed themselves to be carrying out the requirements of the statute, but as they have, in my view, committed a breach of a statutory duty, which may readily be modified by suitable regulations, it becomes necessary to consider whether the respondent was guilty of contributory negligence.

My Lords, on this point there are clear findings of Jones J., who heard all the evidence and saw the respondent demonstrate exactly how he was holding the object called a " key " against the grinding wheel when the accident occurred.

It is most significant that the respondent, in his original statement of claim, alleged that the accident was caused by the negligence of the appellants, their servants and agents, in " providing for use by the respondent and/or requiring or allowing " him to use a machine which was defective " in certain respects which were particularized, and in failing to provide adequate artificial lighting for the use of persons working at the machine. These allegations were all disproved by evidence accepted by the learned judge at the trial. He held (1) " that there really was " nothing wrong with this machine," (2) " that it was a perfectly " safe machine to use, guarded as it was with a guard above " and the rest below, if a person used it in a proper way," and (3) " that there was adequate light for the purpose." As I have already pointed out, the respondent himself said in evidence: " I have used stones for 25 years and have never had an accident " before," while an expert witness, called on his behalf, agreed, in re-examination, that there was " no particular difficulty about " this job as far as an ordinary skilled fitter was concerned." In these circumstances, one might draw the inference that on this particular occasion the respondent must have been negligent, as otherwise the accident would not have happened.

The matter does not, however, rest upon inference. The learned judge went on to hold that " the real cause of the accident " was, unfortunately, the plaintiff's own negligence " and gave his reasons as follows: " What I feel is strongly against him— " though of course I am not really skilled in these matters—is "the way in which he himself showed me he held that key when "he was doing this work. I cannot believe that it was safe and "careful on his part to hold that key right up at the top and then "apply the top of it to this wheel, revolving at a great speed, "with his fingers close to the wheel. If his foot had moved or "he had lost his balance, his finger would have been caught "immediately by this wheel. He was obviously careless in the "way in which he handled the key and it is really unnecessary "to go into the question of whether he might have done this "job in some other way. He agreed that he might have used "a file. I think he might have used something else. He did "not admit, I think, that the portable grindstone would be "useful, but he certainly could have used a file. I do not know "that it was necessary for him to do so; if only he had kept his "fingers away from the grindstone, I do not think any harm "would have been done at all in this case. Of course, he may "say that he knows more about this, obviously, than I do, and "that he could not have done the job properly if he had held "the key further down. Well, the answer to that is quite "obvious. It seems to me that if he could not do it without "putting his fingers into a dangerous position, as he did, he "ought not to have been at this grindstone at all; he ought then "to have used the other method suggested to him of putting the "key in a vice and using a file, or possibly using the portable "grindstone. Although, as I say, I do not want to be too severe "upon him, it seems to me that he was convicted of negligence "by his own demonstration in the witness box of how he held "that key when he applied it to the grindstone."

This conclusion seems to be justified upon the evidence. If it was dangerous for the respondent to hold the key as he did hold it, and if he could not hold this small object to the grindstone in a safe way, then he ought not to have used the grindstone at all, but should have used a file. In effect, the judge took the view that the respondent either "omitted to do that which a "reasonable person would have done, or did that which a person "taking reasonable precautions would not have done."—*per* Alderson B. in *Blyth* v. *Birmingham Waterworks Co.*[20]

This reasoning was accepted in the Court of Appeal by Somervell L.J., who said[21]: " . . . on the judge's findings it "seems to me clear that he" (the respondent) "had a lapse "or did something which I do not think was, on the evidence,

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[20] (1856) 11 Exch. 781, 784.

[21] [1954] 2 Q.B. 21, 27; [1954] 1 All E.R. 901.

"reasonably to be anticipated." Birkett L.J. did not deal specifically with the judge's findings on this matter. He held,[22] rightly, as I think, that "the statutory duty to fence "securely was, of course, to prevent the contact altogether" and continued[23]: "He" (the respondent) "was not doing anything "wrong or stupid or forbidden in using the grindstone." Morris L.J. stated his conclusion thus[24]: "While some measure of "criticism can forcibly be suggested, I have come to the conclusion that any deficiencies or failures on the plaintiff's part "fell short of negligent conduct."

My Lords, for my part I see no good reason for differing from the findings of the learned judge, who was in a much better position than an appellate court to form a conclusion on this matter, in the circumstances of the present case.

The result is that, in my view, although the machine in question was one of an ordinary type in general use, "guarded "as far as was practicable in order to allow the machine to be "used at all" the appellants have failed to perform a statutory duty and must be held to be partly liable for the damage suffered by the respondent: see Law Reform (Contributory Negligence) Act, 1945, ss. 1 (1) and 4.

On the other hand, I agree with the findings of Jones J. as to the negligence of the respondent. In these circumstances I would award the respondent one-half of the £261 6s. damages assessed by the learned judge and would order the appellants to pay one-half of his costs in this House and in the courts below.

LORD REID stated the facts and continued: My Lords, there are now two questions before your Lordships: were the appellants in breach of their statutory duty, and, if they were, was the respondent guilty of contributory negligence?

The breach of statutory duty alleged is failure to comply with the requirements of section 14 (1) of the Factories Act, 1937. That subsection is as follows: [His Lordship read the subsection and continued:]

The question in this case is whether the grinding wheel was securely fenced. The grinding machine was so constructed that no one could come into contact with the lower part of the wheel, but without a fence or hood there was nothing to prevent anyone from coming into contact with the upper part of the wheel, and it was not disputed that without the hood the grinding wheel when in motion would have been a dangerous part of the machine. But the appellants say that with the hood in position the wheel was securely fenced within the meaning of the subsection. It appears to me that the object of fencing is to remove the danger which would exist in its absence, and I would hold that a dangerous part is securely fenced if, and only if, the presence of the fence makes it no longer dangerous within the meaning of that word as it is used in this section. I shall therefore first consider what is the meaning of the word " dangerous " in this context, and on that matter there is a good deal of authority.

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[22] [1954] 1 All E.R. 901, 906.
[23] [1954] 2 Q.B. 21, 32.
[24] Ibid. 35.

In *Hindle* v. *Birtwhistle* [25] a weaver was injured by a shuttle flying out of a shuttlerace in a loom in a weaving shed, and this was due to his having negligently failed to adjust the machine properly. The employer was convicted of an offence in respect of failure to fence. On appeal by case stated the main argument for the employer appears to have been that the shuttles were not dangerous because in a shed of 1,400 looms there had only been four accidents in five years, so the chances of an accident were so small that it would be unreasonable to require fencing. Wills J. said, in a passage in his judgment which has frequently been quoted with approval [26]: " It seems to me that machinery " or parts of machinery is and are dangerous if in the ordinary " course of human affairs danger may be reasonably anticipated " from the use of them without protection. No doubt it would " be impossible to say that because an accident had happened " once therefore the machinery was dangerous. On the other " hand, it is equally out of the question to say that machinery " cannot be dangerous unless it is so in the course of careful " working. In considering whether machinery is dangerous, the " contingency of carelessness on the part of the workman in " charge of it, and the frequency with which that contingency is " likely to arise, are matters that must be taken into considera- " tion. It is entirely a question of degree."

Subsequent statements of the law have added little to this, and I shall quote only two. du Parcq L.J. said in *Walker* v. *Bletchley Flettons Ld.* [27]: " . . . a part of machinery is dangerous " if it is a possible cause of injury to anybody acting in a " way in which a human being may be reasonably expected " to act in circumstances which may be reasonably expected to

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[25] [1897] 1 Q.B. 192.
[26] Ibid. 195–6.
[27] [1937] 1 All E.R. 170, 175.

"occur," and in *Stimpson* v. *Standard Telephones & Cables Ld.*[28] he explained that in saying this he did not mean a possible cause of injury to anyone acting reasonably. The only word which I would query in this passage is "possible." If the question of degree of danger has to be considered it might perhaps be better to say "a reasonably foreseeable cause of injury."

In *Mitchell* v. *North British Rubber Co. Ld.*[29] the Lord Justice-Clerk, Lord Cooper, said: "The necessary and sufficient "condition for the emergence of the duty to fence imposed by "section 14 of the Factories Act is that some part of some "machinery should be 'dangerous.' The question is not whether "the occupiers of the factory knew that it was dangerous; nor "whether a factory inspector had so reported; nor whether "previous accidents had occurred; nor whether the victims of "these accidents had, or had not, been contributorily negligent. "The test is objective and impersonal. Is the part such in its "character, and so circumstanced in its position, exposure, "method of operation and the like, that in the ordinary course of "human affairs danger may reasonably be anticipated from its use "unfenced, not only to the prudent, alert and skilled operative "intent upon his task, but also to the careless or inattentive "worker whose inadvertent or indolent conduct may expose him "to risk of injury or death from the unguarded part?"

I turn to the facts of this case to inquire whether with the hood in position this grinding wheel was still dangerous. I am prepared to assume that the machine was in such a position in the factory that it was highly improbable that anyone else than the man who was operating it could come into contact with the exposed part of the revolving wheel and that the only question is whether this exposed part was dangerous to the operator. As I have said, there was a gap of some seven inches between the hood and the rest, and in fact the respondent's thumb did come into contact with the revolving wheel at that point. But the mere fact that such an accident occurred is not enough; the question is whether before the accident it was reasonably foreseeable that an accident of this kind might happen. I think it was. Moody, who was the chargehand fitter at the time and who was called by the appellants, gave this evidence in cross-examination: "Q. Just "tell me this: you were the chargehand fitter; you agree, do you

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[28] [1940] 1 K.B. 342, 360; 56 T.L.R. 90; sub nom. *Stimson* v. *Standard Telephones & Cables* [1939] 4 All E.R. 225.

[29] 1945 S.C.(J.) 69, 73.

"not, that workpieces of that kind are frequently done, or were at "that time frequently done, on this machine?—A. They had been "done on this machine. Q. And were commonly done on that "machine?—A. It used to be a common practice at one time, but "not so much now. Q. Because you have a notice there saying, "'hand tools only are to be ground'?—A. Yes. Q. At any rate "you, as a chargehand, seeing Frost doing this work on that "grinder, you would not have stopped him, would you?—A. I did "not see him doing that. Q. You would not have stopped him "had you seen him?—A. I would have warned him to be careful. "Q. Did you frequently see people do work of this kind on the "grindstone?—A. I have seen them lately but I have stopped "them. Q. But prior to November, did you frequently see them "use the grindstone for this work?—A. Fairly often." So the appellants must be taken to have known that work comparable to that on which the respondent was engaged was fairly often done on this machine, and, to my mind, the fact that the chargehand thought it necessary to warn workers to be careful is sufficient evidence of danger—danger which could only arise from part of the wheel being exposed.

As I read his judgment, Jones J. held that the exposed part of the wheel was not dangerous, founding on the evidence of the expert witness Mr. Martin. In his evidence in chief Mr. Martin said: "Q. . . . First of all, I just want to ask you this: what do "you say as to the safety or otherwise of doing the work which "the plaintiff described on that workpiece on that particular "grindstone?—A. The end of the key can be 'radiused' with "normal safety, reasonable safety, on this machine by hand. It "is quite a normal job and one which would involve very little "difficulty. Q. You see nothing wrong in doing that work on that "machine?—A. No, provided the rest is properly adjusted and "provided the work is properly done. Q. Tell me this: a saw "having been used on the workpiece to cut off the rough corners, "how long would a job of that kind take if a rough file were to be "used?—A. That is rather difficult to estimate. It would be "quite arduous work. Filing work is quite arduous and there "would be quite a lot of metal removed to true it up, I suppose. "Altogether, it would take perhaps 20 minutes. Q. Normally, a "fitter having to do that job, what method would he adopt? "Would he use a file or a grindstone or some other implement, "or what?—A. If a grindstone was available he would use a "grinder to get the job done more quickly and save himself a "certain amount of work." Then, in cross-examination he said:

"Q. Of course, even without there being any gap, accidents can "happen on these things?—A. Oh, yes, the wheel is the "dangerous part of the machine, in my opinion. There is no doubt "that if you touch it with your hand, you will suffer injury to the "hand. Q. Of course, the smaller the component you are grinding, the nearer your hands have got to be to the stone and the "more care you have got to take?—A. Yes, but of course, usually "the smaller the article, the finer the work, the less pressure you "have to put on it and there is not the same risk of your hand "ever going on to the wheel. Q. No, but of course you remember "that it was being used on this occasion on what is known as "coarse work—taking off a substantial amount?—A. Yes, there "would be a substantial pressure on it, really. Q. I do not know "whether you saw Mr. Frost actually demonstrate. He put the "key on the rest *like that*. And then he did *that*. Of course, "that would bring your thumbs right up very near the wheel, "would it not?—A. Your thumb would approach the wheel; it "need not necessarily go very near it. Q. But if you took your "eye off the ball, so to speak, you could overdo it?—A. If you "did not look, you could push your hand on the wheel, yes, I "agree. Q. And the tendency, when you push the key up against "the stone, is to force it like *that*, is it not?—A. Yes. It is not "much more than a tendency if it is supported by a flat surface "because the effective leverage you have is fairly high. The key "is four inches long and the other arm of the lever, so to speak, "is ⅜-inch long and, consequently, every downward force by the "wheel, you have only perhaps an ounce of upward force at the "end. Q. But you agree that there is a tendency?—A. Yes. "Q. It may be slight?—A. Yes. Q. Therefore, if you are holding "like *that*, you have got to be careful to operate against that "tendency?—A. You must always control your workpiece if you "are using a grindstone. Q. If you have it upright, without "putting it on the rest, the tendency is to go like that?—A. Yes, "it could go down then. There would be nothing to stop it. "That is what the work rest is there for, of course." The gist of Mr. Martin's evidence is that the work could be done with reasonable safety if done carefully. But that is not the test: that is not inconsistent with the exposed part of the wheel being dangerous. It is, in my judgment, clear that a part of a machine is dangerous although it is only dangerous to a careless or inattentive worker. No doubt that danger must be such that it can reasonably be anticipated, but in this case I think that danger to such a worker was reasonably foreseeable. So, if the meaning which I would attach to the words "securely fenced" is the correct meaning, the grinding wheel was not securely fenced at the time of this accident. But two other and different meanings were submitted in argument.

For the respondent it was argued that the mere fact that a person is injured by coming into contact with the dangerous part shows that it was not securely fenced because "securely fenced" means fenced against all dangers whether foreseeable or not. This matter was considered by the Court of Appeal in *Burns* v. *Joseph Terry & Sons Ld.*,[30] and the respondent relied on the dissenting judgment of Denning L.J. I agree with the judgment of Somervell L.J. Apart from other considerations, the terms of section 14 (1) itself appear to me to require this conclusion. The subsection requires fencing unless the dangerous part is in such a position or of such construction as to be as safe as it would be if securely fenced. If "securely fenced" means fenced against foreseeable danger then it is possible to say in advance that the dangerous part is in such a position that there is no foreseeable danger and therefore it is as safe as if it was fenced. But if "securely fenced" means fenced against all danger even if unforeseeable and an unforeseeable accident occurs then the event proves that the unfenced part was not as safe as if it had been fenced. As one cannot foresee the unforeseeable I do not see how on this view one could ever say in advance that any dangerous part left unfenced was as safe as it would be if securely fenced, because there would always be the chance of some unforeseeable accident happening and proving that that part had not in fact been as safe as it would have been if fenced.

For the appellants it was argued that "securely fenced" means fenced as securely as is possible without making the machine unusable. It was said, and I shall assume truly said, that neither this nor any other grinding machine is usable at all unless part of the grinding surface is left exposed and that any fence which would avoid all foreseeable danger of contact with the grinding wheel would also prevent any grinding work from being done. There might be a point in the present case that the gap of seven inches could have been narrower, but it seems clear that even if it had been somewhat narrower that would not have prevented the accident. Any gap which permitted the metal bar to be held against the wheel would have been large enough to admit the respondent's thumb. It follows that, if "securely

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[30] [1951] 1 K.B. 454; [1951] 1 T.L.R. 349; [1950] 2 All E.R. 987.

"fenced" means fenced against all foreseeable danger, section 14 (1) makes the use of all grinding machines illegal. The appellants say that Parliament cannot have intended such a result and therefore "securely fenced" must be given a meaning sufficiently restricted to allow such machines to be operated without breaking the law.

My Lords, we are not entitled to ascertain the intention of Parliament from any other source than the terms of the Act. Before such a meaning could be attached to this section it would be necessary to hold that it is reasonably capable of being construed in this way; but, for a number of reasons which I shall explain, it is not, in my judgment, capable of bearing that construction. So to interpret the section would not be construing the words of the section but adding to the section a qualification or proviso which is not there. If the appellants were right the question of whether a fence was secure would in cases like the present case depend not on the nature of the danger or the character or sufficiency of the fence but on the practicability of working the machine in a safe condition: there might be obvious and, indeed, acute danger in working a machine in a partially fenced condition but yet on the appellants' argument the machine must be held to be securely fenced if more effective fencing would make it unusable. It is perhaps not surprising that Parliament refrained from adding a qualification to the section which could lead to such a result. But, as will appear when I come to deal with section 60 of the Act, I do not think that this difficulty was wholly unforeseen or neglected.

In other sections of this Act where Parliament intended to qualify an obligation to provide for safety an express qualification is inserted. For example, section 25 (3) provides: "All openings "in floors shall be securely fenced, except in so far as the nature "of the work renders such fencing impracticable"; section 22 (4) provides for alternatives where it is not reasonably practicable to fit the required devices; and section 26 (1) requires the provision of safe means of access so far as is reasonably practicable. But I need not even go to other sections of the Act because the proviso to section 14 (1) is itself inconsistent with the meaning which the appellants seek to attach to "securely fenced." It deals with cases where safety cannot be secured by means of a fixed guard by reason of the nature of the operation and then enacts that the requirements of the subsection shall be deemed to have been complied with if certain other measures are taken. It follows that if these other measures are not taken, or owing to the nature of the machine cannot be taken, then the requirements of the subsection have not been complied with. But the appellants' argument is that if by reason of the nature of the operation the safety of a dangerous part cannot be secured by any kind of guard the requirements of the subsection have been complied with.

There is authority of long standing against the appellants. In *Davies* v. *Thomas Owen & Co. Ld.*,[31] a jury had found that it was commercially impracticable to fence a calender pressing machine, but Salter J. gave judgment for the plaintiff. He said: "The obligation imposed by the Factory and Workshop Act, "1901, in relation to the fencing of dangerous machinery, is "absolute. It is an obligation, not merely to fence, but to fence "securely. The statute does not say that dangerous machinery "shall be securely fenced if that is commercially practicable or "mechanically possible. If a machine cannot be securely fenced "while remaining commercially practicable or mechanically "useful the statute in effect prohibits its use." That decision was followed in a number of other cases shortly after its date, and when the new Factories Act was passed in 1937 Parliament must be supposed to have been aware of the construction which had been put on section 10 (1) of the 1901 Act. Nevertheless, the terms of that section were repeated substantially unchanged in section 14 of the 1937 Act. In those circumstances there is at least a very strong presumption that the qualification for which the appellants contend was deliberately omitted.

But that does not mean that Parliament failed to provide any means by which the use of grinding machines could at least in certain cases be made lawful. On this matter I think it desirable to note the history of the legislation. Section 6 of the Factory and Workshop Act, 1878, provided procedure whereby a dangerous part of a machine could be required to be securely fenced, but that was not to apply if it was decided that it was impossible to fence the machinery. Under the Act of 1901 there was no preliminary procedure and all dangerous parts were required to be securely fenced or to be in such position or of such construction as to be equally safe as if securely fenced. The provision with regard to impossibility of fencing dropped out. But a somewhat obscure section, section 79, enabled the Secretary of State to make regulations. After the decision in *Davies* v. *Thomas Owen & Co. Ld.*[32] it was apparently realized that the reasoning of Salter J. would make the use of circular saws illegal, and the power to make regulations was used to enact the Woodworking Machinery Regulations, 1922, by which a modified form of fencing for saws was provided. This matter was dealt with in *Miller* v. *William Boothman & Sons Ld.*[33] By that time section 60 of the 1937 Act had replaced the old power to make regulations, and by section 159 of the 1937 Act the old regulations were now deemed to have been made under section 60. In *Miller's* case,[33] the fencing complied with the regulations but did not comply with section 14 (1) of the Act, and the Court of Appeal held that there had been no breach of statutory obligation, because section 60 authorized the Secretary of State to modify the requirements of the Act and he had done so.

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[31] [1919] 2 K.B. 39, 41.

[32] [1919] 2 K.B. 39.

The appellants argued that *Miller's* case[33] was wrongly decided. In my judgment, it was rightly decided. Section 60 empowers the Minister to make special regulations which may, inter alia (subsection (2) (*c*)), "modify or extend with respect "to any class or description of factory any provisions of Part I, "Part II or this Part of this Act, being provisions imposing "requirements as to health or safety." The words "modify or "extend . . . any provisions" are not very happily chosen, but I think that the reasonable and correct meaning is that as regards any particular class or description of factory the Minister has power to increase or diminish the stringency of the statutory requirements and may substitute other provisions for those of the Act. In the recent case of *Richard Thomas & Baldwins Ld.* v. *Cummings*[34] I expressed the view that section 60 did not entitle the Minister to make a general amendment of a section: in that case the argument was that regulations could be made in effect to alter the terms of section 16 of the Act. In my view, the Minister cannot alter the terms of the Act, but he can within a limited sphere substitute other provisions for those of the Act.

It remains to consider whether the respondent was guilty of contributory negligence. The appellants sought at the trial to prove that the respondent ought not to have used this machine at all for the work which he was doing but ought to have used a file or a portable grindstone. The evidence which I have already quoted is, I think, sufficient to show that the respondent was well entitled to use this machine, so the only question is whether he used it negligently. Mr. Martin, the expert, said that he disagreed with the respondent's method of using the machine only in one respect: he would have done the work with the axis of the semi-cylinder vertical instead of horizontal so that the bar to be ground would always lie flat on the rest and the man's hands would swing it sideways and not up and down. Mr. Martin did not say that the respondent's method was foolhardy or that no careful fitter would have used it, and Mr. Martin's method was not put to the respondent. The line of cross-examination of the respondent was that he ought not to have used the grinding machine at all, and, as I have said, that line of attack failed. I think that the respondent was guilty of an error of judgment in using the method he did, but I can find no evidence to the effect that no careful fitter would have used this method. Jones J. said that reasonable precautions would have required that he should have kept his fingers farther away from the grindstone, but I can find no evidence to the effect that if he had kept his fingers farther away he would have had sufficient control of the work, and I do not think that it is self-evident that if he had kept his fingers a little farther away—it could only be a little farther—the chance of an accident would have been much less. Jones J. said that he thought that if the respondent had exercised just a little more care the accident never would have happened. I would agree, but the question is whether failure to exercise just a little more care amounts to negligence.

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[33] [1944] K.B. 337.

[34] Ante, 321, 334; [1955] 1 All E.R. 285.

In *Flower* v. *Ebbw Vale Steel, Iron & Coal Co. Ld.*[35] my noble and learned friend, Lord Oaksey (then Lawrence J.), said: "I "think, of course, that in considering whether an ordinary "prudent workman would have taken more care than the injured "man, the tribunal of fact has to take into account all the "circumstances of work in a factory and that it is not for every "risky thing which a workman in a factory may do in his "familiarity with the machinery that a plaintiff ought to be held "guilty of contributory negligence." That statement of the law has been approved in this House on several occasions, and, applying it to the present case, although I think that the case is a narrow one, I have come to the conclusion that the respondent ought not to be held guilty of contributory negligence. If I had taken the other view I would have thought that he ought only to bear a small share of the responsibility. I am of opinion that this appeal should be dismissed.

LORD KEITH OF AVONHOLM. My Lords, the grindstone in this case was a fixed grindstone moved by electric power at 1,450

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[35] [1934] 2 K.B. 132, 140.

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revolutions per minute. In an entirely unfenced condition it would, while moving, clearly cause injury to anyone in the factory coming into contact with it. The risk would generally be to the operator, using the machine, because it was a machine turned on and off as required, but there could be risk to anyone standing or passing by while the operator was using it and it might, of course, be put in motion by someone who was quite inexperienced and not entitled to use it. It could hardly be said that in an entirely unfenced condition the risk of someone in the factory making contact with the face of the grindstone, while it was moving, either through inadvertence, or inexperience in using it, or through slipping, or in some other way accidentally coming up against it, was not a thing reasonably foreseeable. The risk was no doubt reduced by the fact that it was fitted with a hood at the back and with a rest at the front, but there was still left a space of some seven inches in which the revolving face of the grindstone was unprotected and, in that condition and to that extent, it still presented precisely the same kind of foreseeable risk of harm as it would have done if entirely unfenced, diminished only in degree. Accordingly, under the conditions in which the grindstone was being used at the time of the accident, it was a dangerous machine, or dangerous part of a machine, according to the test of reasonable foreseeability of accident, repeatedly and, in my opinion, correctly laid down in various cases in which this question has been considered, as, for example, in *Hindle* v. *Birtwistle*,[36] *per* Wills J.; *Walker* v. *Bletchley Flettons Ld.*,[37] *per* du Parcq J.; *Lyon* v. *Don Brothers, Buist & Co. Ld.*,[38] *per* Lord Justice-General Normand; *Mitchell* v. *North British Rubber Co. Ld.*,[39] *per* Lord Justice-Clerk Cooper; *Burns* v. *Joseph Terry & Sons Ld.*,[40] *per* Somervell L.J. If direct evidence of a witness is wanted it is to be found in an answer given by the plaintiff's expert witness in cross-examination: "Oh, yes, the wheel is the "dangerous part of the machine, in my opinion. There is no "doubt that if you touch it with your hand, you will suffer injury "to the hand."

The learned trial judge said: "I have no doubt that the "machinery should be regarded as dangerous: in other words, that "this was a dangerous part of the machine," by which I take him to be referring to the revolving grindstone. But he goes on to hold "that it was properly guarded by the guard at the top and "by the rest at the bottom." If so, it would seem to follow that it, or any part of it, had ceased to be dangerous. There may be cases in which a trial judge is entitled to find conclusively as a matter of fact that a machine is not dangerous in its fenced condition but, in my opinion, this is not one of them. It must at least be fenced against the dangers that are reasonably foreseeable and, for the reasons I have stated, these same dangers still remained, though in a reduced degree, when the machine here was being worked in its fenced condition. The grindstone, in my opinion, was not securely fenced.

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[36] [1897] 1 Q.B. 192.

[37] [1937] 1 All E.R. 170.

[38] 1944 S.C.(J.) 1.

[39] 1945 S.C.(J.) 69.

[40] [1951] 1 K.B. 454.

It was submitted for the appellants that fencing was required only to such an extent as would preserve the identity of the machine by permitting its use. Obviously this grindstone could be completely fenced in such a way as to make its use impossible. Whether there are ways of securely fencing a grindstone so as to permit use of its grinding face I do not know. The ingenuity of man may not be exhausted in this matter. But if not, the only result is that, as the law stands, the use of grindstones of a dangerous character is prohibited. This possibility has been faced before in the case of a calendering machine, *Davies* v. *Thomas Owen & Co. Ld.*[41]; a power press, *Sowter* v. *Steel Barrel Co. Ld.*[42]; a cutting machine, *Dennistoun* v. *Charles E. Greenhill Ld.*[43]; a drilling machine, *Mackay* v. *Ailsa Shipbuilding Co. Ld.*[44]; and this would have been the position in the case of circular saws, but for regulations made by the Secretary of State, in *Miller* v. *William Boothman & Sons Ld.*[45]

Apart from the authority of the cases just cited, the inference, from a consideration of the Factories Act, 1937, and similar earlier legislation, is that there exist, side by side, a series of absolute statutory obligations and a series of qualified statutory obligations. Where the legislature wished to qualify an obligation imposed by the Factories Act, 1937, it found no difficulty in using apt language to do so, by such words as "all practicable steps" (sections 18 (1), 19 (3)), "except in so far as the nature of the "work renders such fencing impracticable" (section 25 (3)), "so far as is reasonably practicable" (section 26), "all practicable measures" and "where the nature of the process makes it "practicable" (section 47 (1)). Provision, moreover, is made,

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[41] [1919] 2 K.B. 39.

[42] (1935) 99 J.P. 379.

[43] [1944] 2 All E.R. 434.

[44] 1945 S.C. 414.

[45] [1944] K.B. 337.

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by section 60 of the Act, giving the Secretary of State power to modify by special regulations any of the statutory provisions imposing requirements as to health or safety. I do not regard it as necessary to consider what limits, if any, there are on this power to make such regulations, because no question as to the validity of any regulations made under this section is before us. I would, however, take this opportunity of qualifying my concurrence in the opinion of my noble and learned friend, Lord Reid, in the case of *Richard Thomas & Baldwins Ld.* v. *Cummings*,[46] in so far as it may be taken as committing me to the view that the Secretary of State has no power to qualify the absolute obligations imposed by the statute. On that matter I reserve my opinion. It is at least intelligible that Parliament may have desired to legislate in the most absolute terms against the exposure of dangerous machinery, or dangerous parts of machinery, leaving special cases to be dealt with by executive action as they arose, and that the words " subject to the provisions of the Act " in section 60, in the grammatical context which they occupy in the section, refer to compliance with the provisions for making special regulations and not to the safety provisions of the Act.

But, be that as it may, I see no escape from the view that, as matters at present stand, the destruction of the machine as a working unit, if it is completely fenced, is no answer to the mandatory words of the statute. It had been so decided with reference to the earlier legislation of the Factories and Workshops Act, 1901, by the decision in *Davies* v. *Thomas Owen & Co. Ld.*,[47] and, I think, in *Sowter* v. *Steel Barrel Co. Ld.*,[48] and Parliament, in enacting the relevant safety provisions in 1937, in substantially similar terms, must be assumed to have had the state of the law in mind.

In *Lewis* v. *Denye*,[49] the point as to the absolute nature of the statutory obligation was reserved by this House. No reference was there made to the possibility of relaxation from the absolute prohibition by special regulations made under the statute. That qualification was recognized in the case of *Miller* v. *William Boothman & Sons Ld.*[50] and no question was raised there of the validity of the regulations. The question of the absolute character of the obligation imposed by section 14, notwithstanding the alleged commercial impracticability of fencing,

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[46] Ante, 321, 334.
[47] [1919] 2 K.B. 39.
[48] 99 J.P. 379.
[49] [1940] A.C. 921; 56 T.L.R. 900; [1940] 3 All E.R. 299.
[50] [1944] K.B. 337.

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came up for consideration also in Scotland in *Mackay* v. *Ailsa Shipbuilding Co. Ld.*[51] and the decision there was in line with earlier English authority. In my opinion, that was a correct decision.

It follows from what I have said that the experience of the workman operating the machine, the infrequency of accidents, and the views of factory inspectors or other interested authority on the working of grinding machines are not here relevant considerations. The long history of the use of grinding machines in an exposed or partially exposed condition, the presumed (but unproved) infrequency of accidents and the acquiescence of factory inspectors and the Minister concerned were strongly pressed on us as material factors. But, unless possibly in a marginal case, such matters, in my opinion, can carry no weight. In this connexion I adopt the language of Lord Cooper, then Lord Justice-Clerk, in *Mitchell* v. *North British Rubber Co. Ld.*[52]: "The necessary and sufficient consideration for the emer- "gence of the duty to fence imposed by section 14 of the "Factories Act is that some part of some machinery should be "'dangerous.' The question is not whether the occupiers of the "factory knew that it was dangerous; nor whether a factory "inspector had so reported; nor whether previous accidents had "occurred; nor whether the victims of these accidents had, or "had not, been contributorily negligent. The test is objective "and impersonal. Is the part such in its character, and so "circumstanced in its position, exposure, method of operation and "the like, that in the ordinary course of human affairs danger "may reasonably be anticipated from its use unfenced, not only "to the prudent, alert and skilled operative intent upon his task, "but also to the careless or inattentive worker whose inadvertent "or indolent conduct may expose him to risk of injury or death "from the unguarded part?"

There remains the question of contributory negligence. It is for the appellants to prove this against the workman. In my opinion, they have failed to do so. The type of accident that happened here is just the type of accident against which section 14 is directed. There is no question here of disobedience to orders, or of reckless disregard by a workman of his own safety. At most there was a mere error of judgment by the plaintiff as to how the work on which he was engaged could best be carried out, and possibly only a mere momentary inadvertence. I agree with

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[51] 1945 S.C. 414.

[52] 1945 S.C.(J.) 69, 73.

Morris L.J.[53] that what the plaintiff did "fell short of negligent "conduct."

I would dismiss the appeal.

Appeal dismissed.

Solicitors: *Carpenters for Laces & Co., Liverpool; W. H. Thompson.*

F. C.

[53] [1954] 2 Q.B. 21, 35.

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Feb. 21, 22, 23, 24, 28; *March* 24.

MASON AND ANOTHER . . . . . . APPELLANTS;

AND

CLARKE . . . . RESPONDENT.

Landlord and Tenant—Profit à prendre—Game—Reservation of game, rabbits, etc.—Grant of rabbiting rights by landlord—Interference by tenant—Equitable title to profit à prendre—Possession—Exercise of right—Laying snares in open fields—Reasonable exercise.

Agriculture. Equity—Clean hands—Equitable right—Evidenced by false receipt—Innocent recipient—Enforceability. Profit à prendre.

A landowner, a limited company, let farm land to a farmer by an agreement which reserved to itself "(subject to the provisions "of the Ground Game Act, 1880) all the game, rabbits, wild fowl "and fish with liberty for itself and all other persons authorized "by it, to preserve, shoot, hunt, course, kill and carry away the "same," and the farmer agreed (subject to the Ground Game Act) "not to shoot or otherwise sport on the land." In October, 1950, the landowner orally agreed to let the rabbiting rights to a rabbit catcher for a year for the sum of £100. The rabbit catcher paid this sum and was given a receipt, which stated that the consideration of £100 was a contribution "towards bailiff's "wages." The rabbit catcher, having gone round the land with the landowner's bailiff and told the farmer of his position, laid snares on land used for sheep grazing by the farmer, who took up the snares and committed other acts of interference with the exercise of the rabbiting rights. In an action in which the rabbit catcher and the landowner claimed damages and an injunction against him he pleaded (a) that the receipt could not be relied on because its terms were couched in furtherance of an illegal purpose, viz., to enable the landowner to defraud the Inland Revenue;

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* *Present*: Viscount Simonds, Lord Oaksey, Lord Morton of Henryton, Lord Reid and Lord Keith of Avonholm.

(b) that the rabbit catcher had no enforceable right to the profit à prendre; and (c) that the reservation and grant did not confer any right to lay snares in the farmer's fields:—

Held, (1) that even if there had been a fraudulent intention in the form of the receipt (which was not established), the rabbit catcher was not aware of it and would not therefore have been debarred by it from enforcing an agreement not in itself illegal.

Alexander v. *Rayson* [1936] 1 K.B. 169; 52 T.L.R. 131 distinguished.

(2) That the rabbit catcher had a right enforceable in equity to the profit à prendre, having enjoyed sufficient possession of it, and that the farmer was none the less a trespasser on the incorporeal hereditament because he was himself the occupier of the land.

(3) That the laying of the snares was a proper exercise of the rabbiting rights and neither extraordinary nor unreasonable.

Peech v. *Best* [1931] 1 K.B. 1; 46 T.L.R. 467 distinguished.

Decision of the Court of Appeal [1954] 1 Q.B. 460; [1954] 1 All E.R. 189 reversed.

APPEAL from the Court of Appeal (Somervell, Denning and Romer L.JJ.).

This was an appeal by leave of the House of Lords from a judgment of the Court of Appeal given on and entered December 8, 1953, whereby the court set aside the judgment entered for the appellants, Eric Mason and Shepton Mallet Transport Ld., for £150 and £50 respectively with costs on May 8, 1953, in an action tried before Croom-Johnson J. sitting without a jury, wherein they were plaintiffs and the respondent, John Maurice Clarke, was defendant, and ordered that judgment be entered in favour of the respondent on the claim with costs, including the costs of that appeal, and further ordered that the cross-appeals of the appellants be dismissed.

The appeal raised the following questions: (1) The construction of the following terms contained in agreements relating to certain agricultural holdings in the possession and occupation of the respondent: (a) "The landlord . . . reserves (subject to the pro-"visions of the Ground Game Act, 1880), all the game, rabbits, "wild fowl and fish with liberty for himself and all other persons "authorized by him to preserve, shoot, hunt, course, kill and "carry away the same." (b) "The tenant agrees . . . (subject "to the provisions of the Ground Game Act, 1880), not to shoot "or otherwise sport on the land."

(2) Whether the respondent was, at any time material to the action, in breach of the term (b) above.

(3) The true construction of the Ground Game Act, 1880.

(4) Whether the appellants had been guilty of, or a party to,

a fraud, or an attempt at a fraud, on the Inland Revenue, as alleged by the respondent, in relation to the letting, and the effect of the alleged fraud on a parol agreement between the appellants for the letting to the appellant Mason of the right to shoot rabbits.

(5) Whether the appellant Mason was at any material time in possession of a profit à prendre so that he could, without showing title, maintain an action in the nature of trespass against the respondent, that is to say, whether he had a good possessory title.

(6) Whether the appellant Mason had, at any time material to the action, an agreement enforceable against the appellant company, Shepton Mallet Transport Ld., by specific performance.

(7) Whether, in the circumstances of the case, the appellant Mason could sue quia timet after December 30, 1950.

(8) Whether certain conduct of the respondent alleged against him in the amended statement of claim in this action, even if proved, amounted to a trespass by him against an incorporeal hereditament, namely, the profit à prendre alleged to have been created by the reservation referred to in paragraph 1, and whether that conduct amounted to a breach of his agreement referred to in paragraph 1 (b) not to shoot or otherwise sport on the land.

The facts are stated in the opinions of Viscount Simonds and Lord Reid.

Gerald Gardiner Q.C. and *John Hobson* for the appellants. The respondent relied on *Alexander* v. *Rayson* [1] in support of the proposition that Mason's agreement with the company was unenforceable by him because it appeared that the receipt was intended to be used by the company for a fraudulent purpose. But that case does not apply because, in the first place, there was no intended fraud and, in the second place, even if there had been, Mason was an innocent party and would not therefore have been debarred from enforcing the agreement. Atkinson, of the firm of auctioneers entrusted with the transaction, carried it out according to the instructions of Bennett, the company's managing director. His role was that of a conduit pipe and his integrity is not challenged.

As to the agreement between the landlord and the tenant relating to the game, words of reservation of sporting rights operate, not as a reservation proper, but by way of regrant: *Wickham* v. *Hawker*.[2] Further, sporting rights are an interest

[1] [1936] 1 K.B. 169; 52 T.L.R. 131.

[2] (1840) 7 M. & W. 63.

in the realty and a grant of them is a profit à prendre: *Ewart* v. *Graham.*[3] If it had been put differently, *Spicer* v. *Barnard*[4] should have been decided otherwise than it was; it was assumed that the right to sport did not cover rabbits, which were not therefore within a reservation of game by the lessor. (This case was decided under the Game Act, 1831, ss. 1, 12 and 30.) A reservation in a lease of sporting rights is not limited to game strictly so called but covers animals which are in common parlance the subject of sport: *Jeffryes* v. *Evans.*[5] *Fetherstonhaugh* v. *Hagarty*[6] is no authority for the proposition that a tenant may destroy rabbits merely to protect his crops. Mason, having a profit à prendre, an incorporeal hereditament, had a right of action against the respondent for wrongfully interfering with it: *Fitzgerald* v. *Firbank.*[7] His laying of snares was a proper exercise of his rights and was neither extraordinary nor unreasonable. The circumstances were quite different from those in *Peech* v. *Best.*[8] The grant enjoyed by Mason was more than a mere licence: *Lowe* v. *Adams.*[9] The actions of the respondent constituted a trespass against Mason's rights as well as a breach of the reservation in the lease and also of his (the respondent's) own covenant therein not to sport on the land.

As to the relief to which the appellants are entitled, the invasion of the legal right carries with it a right to damages: *Nicholls* v. *Ely Beet Sugar Factory Ld.*[10] Here there has been an invasion of the rights of both the appellant company and Mason and both are entitled to damages without proof of pecuniary loss. The damages here awarded were not adequate, even leaving out of account any punitive element. Punitive damages should have been awarded: *Merest* v. *Harvey*[11] and *Loudon* v. *Ryden,*[12] particularly in view of the charge of fraud persisted in at the trial.

The Ground Game Act, 1880, was never pleaded by the respondent, who in his conduct was not exercising his rights under it but was wrongfully interfering with the rights of the appellants. Apart from that Act he had no right to kill rabbits on the land.

John Hobson following. As to the alleged fraud, there is no evidence of it in the company's operations or accounts. As to

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[3] (1859) 7 H.L.C. 331.

[4] (1859) 1 E. & E. 874.

[5] (1865) 19 C.B.N.S. 246.

[6] (1878) 3 L.R.Ir. 150.

[7] [1897] 2 Ch. 96; 13 T.L.R. 390.

[8] [1931] 1 K.B. 1; 46 T.L.R. 467.

[9] [1901] 2 Ch. 598; 17 T.L.R. 763.

[10] [1936] Ch. 343, 347.

[11] (1814) 5 Taunt. 442.

[12] [1953] 2 Q.B. 202, 207; [1953] 1 All E.R. 741.

Mason's right to lay snares as he did, he employed a usual and reasonable method of snaring rabbits. As to the point relied on by Denning L.J.,[13] "that a person who comes onto a farmer's "land asserting that he has the authority of the owner so to do, "must be prepared to vouch his authority when called on to do "so." This is not so, as the farmer has no interest in the profit. It is not necessary, in any event, that the person authorized shall be authorized in writing. A mere oral authority is enough. When a farming tenant has undertaken to protect the profit à prendre for the landlord, the question is the same as in all cases of trespass, namely: Is the person authorized? and not: Can you vouch your authority here and now? The tenant can ask the person coming onto the land whether he does so with the landlord's authority or he can ask the landlord. If there is no authority he can turn him off. With regard to Mason's right at the material times in relation to the profit à prendre, he was in equity entitled as against the appellant company to specific performance of the oral agreement for rabbiting rights. He was in law in possession of a several profit à prendre which he could protect before the world by an action in the nature of trespass. His title rested on possession: see *Bristow* v. *Cormican*[14] and *Nicholls* v. *Ely Beet Sugar Factory Ld.*[15] As to Mason's position after December 30, 1950, he then acquired the legal title to the profit à prendre and became entitled to sue in his own name. In view of the respondent's previous conduct and words, he could sue quia timet. With regard to the award of special damages, though at one time during the trial the judge indicated that he would refer any question of a claim by Mason for special damage and excluded cross-examination directed to that issue, he was later invited by counsel to make such award as he thought fit.

Lloyd-Jones Q.C. and *Perrett* for the respondent. Everyone who considered the form of this receipt has been put on inquiry as to its object, including Atkinson. His bona fides and integrity are not challenged, but he was acting as a mere conduit pipe for the form dictated by Bennett. Nor is there any allegation against Lumley, the company's secretary, who did not know what was the right way to deal with this payment. But Mason, had he considered the matter, must have realized that on the face of it the receipt was dishonest. If a person puts in a receipt or in his books a false description such as this, a dishonest intention is to be presumed, even if it is not clear what that intention was. The only proper inference from its false wording was that it was designed to defraud the Inland Revenue or for some other dishonest purpose. The sum ought to have been brought in and shown as a taxable receipt. To treat it as a deduction from expenses paid instead of rent received might result in a smaller tax liability. The way this payment was entered brought it under the maintenance provisions of the Income Tax Act, 1918: see rule 8 of No. V of Schedule A. If it had been otherwise entered it would have fallen under Schedule D. See also section 15 of the Finance Act, 1940.

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[13] [1954] 1 Q.B. 460, 469; [1954] 1 All E.R. 189.

[14] (1878) 3 App.Cas. 641.

[15] [1931] 2 Ch. 84.

It is true that the company's fraud does not necessarily import a fraudulent intention by Mason but, on the evidence, he was involved in the fraud. When he saw the form of the receipt he should have refused to go on with the transaction and, had he done so, he would have been entitled to get his money back.

Since the document was so drawn up as to be designed to defraud the Inland Revenue, Mason could not avail himself of it, and accordingly he was not lawfully authorized to go on the land. This was a dishonest and tainted contract of which specific performance would not be granted: see Cheshire and Fifoot on Contract, 3rd ed., p. 286; *Alexander* v. *Rayson*[16]; *Miller* v. *Karlinski*[17]; *In re Mahmoud and Ispahani's Arbitration*,[18] and *Bostel Brothers Ld.* v. *Hurlock.*[19]

The judge should have found that anyone who received this receipt must have been put on inquiry about it and must have accepted it knowing that it was at least capable of being used to defraud the Revenue.

As to the assessment of the evidence, there are occasions when it is proper for the House of Lords to take a different view of the evidence from the judge of first instance: see *Benmax* v. *Austin Motor Co. Ld.*[20] and *Yuill* v. *Yuill.*[21] Where the evidence of Mason and Clarke conflict, that of the latter which was corroborated by his son should be accepted.

On no view was Mason the owner of a legal profit à prendre until December 30, 1950, and there is no case where an equitable right has been held sufficient basis for an action in trespass. His rabbiting rights at the material time had been granted orally, so that he had no profit à prendre and therefore no legal right in respect of which an action for trespass could be maintained.

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[16] [1936] 1 K.B. 169, 187.

[17] (1945) 62 T.L.R. 85.

[18] [1921] 2 K.B. 716; 37 T.L.R. 489.

[19] [1949] 1 K.B. 74; 64 T.L.R. 495; [1948] 2 All E.R. 312.

[20] Ante, 370; [1955] 1 All E.R. 326.

[21] [1945] P. 15, 19; 61 T.L.R. 176; [1945] 1 All E.R. 183.

The respondent, concurrently with the appellant company, was at all material times the owner of the right to take all the rabbits from the land by reason of the provisions of the Ground Game Act, 1880. Therefore, save in the case of ouster from the land of one such owner by the other (which did not happen here) one concurrent owner cannot maintain trespass against the other. The company, further, could not make an effective grant of a several profit à prendre in gross in respect of the rabbiting rights. Mason cannot bring an action founded on trespass in respect of alleged interference during the period before the legal grant to him. No possessory right in him could found an action against the respondent: see Salmond on Torts, 11th ed., p. 273.

The policy of the Act of 1880 is plainly to confer on the occupier of land rights in respect of ground game which he did not enjoy before, and section 9 protects him when he is acting in accordance with the Act: see *Bruce* v. *Prosser*[22] and Oke's Game Laws, 5th ed., p. 112.

As to the farmer's duty to destroy pests, see the Agriculture Act, 1947, ss. 9, 10, 11 (1) (2) (*d*), 98 and 100. This Act has put him in the position that if he refuses to take certain steps of pest clearance he does so at his peril. By 1947 the rabbit was regarded as a pest. The respondent was accordingly protected in the steps he took for the destruction of the rabbits. Further, under section 1 (*a*) and (*b*) of the Act of 1880 the word "employed" includes any employment, direct or indirect, and the Agricultural Committee's servant who gassed the rabbits was indirectly employed by the respondent. Both he and the man who killed and took away the rabbits were duly authorized in writing. The Act of 1947 provides some criterion for measuring whether or not it was reasonable to object to the steps taken by the respondent. One cannot exclude these provisions from consideration in looking at the respondent's position when confronted with delay in shooting the rabbits and with the problem of the snares.

The agreement between Mason and the company did not give him the right to lay snares in open fields. That would have been unreasonable, since the object of the letting of the land was that it should be used for grazing. Snares should not have been permitted save by arrangement with the respondent: see *Peech* v. *Best.*[23]

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[22] (1898) 25 R.(J.) 54.

The appellants relied on *Loudon* v. *Ryder*[24] to justify the award of vindictive damages on the ground of something happening at the trial of the action. But what Singleton L.J. said there was only in explanation of what had happened in that case and did not lay down that it would always be right and proper. This is not a case for exemplary damages. If anything, there should be nominal damages and no injunction. To persist in a charge of fraud at the trial does not warrant the award of vindictive damages. There should be no injunction because the dispute is absolutely bona fide and, once the House of Lords has ruled, its ruling will be observed. The solution of the problem disposes of the need for an injunction.

Perrett following. As to the award of special damages, it is admitted that at the trial counsel finally invited the judge to make such award as he thought fit.

As to Mason's alleged possessory title, before a plaintiff can rely on possession he must show that it is exclusive to himself. Actual possession is a question of fact: *Revett* v. *Browne.*[25] But here under section 1 of the Act of 1880 the respondent was "concurrently" in possession of the profit à prendre by a statutory title. Accordingly no one else could have exclusive possession.

Further, when the respondent did the acts complained of, Mason's agreement with the appellant company was unenforceable by action, since there was no note or memorandum thereof sufficient to satisfy section 40 of the Law of Property Act, 1925: see *Burgess* v. *Cox*[26] and *Walsh* v. *Lonsdale.*[27] Mason's alleged rights at the material time were granted orally and not by deed, and so he had no legal right in respect of which he could maintain an action for trespass. In any event the agreement was void under section 3 of the Act of 1880.

Should the House allow this appeal there would be no need to grant an injunction since it is over four years since there was any complaint of the respondent's conduct, apart from his litigating the matter. The effect of the past gassing of the rabbits cannot now have any effect, for they increase at a great rate and,

[23] [1931] 1 K.B. 1.

[24] [1953] 2 Q.B. 202, 207.

[25] (1828) 5 Bing. 7, 9.

[26] [1951] Ch. 383; [1951] 1 T.L.R. 531; [1951] 2 All E.R. 1212.

[27] (1882) 21 Ch.D. 9.

like rats, come back. As to the powers of dealing with rabbits, see also the Pests Act, 1954, s. 1 (4).

Gerald Gardiner Q.C. in reply. As to Mason's right to sue based on possession of the profit à prendre, see *Bristow* v. *Cormican.*[28] The documents together do constitute a sufficient memorandum in writing. As to the gassing of the rabbits, this was unauthorized by anything in any statute. With regard to the question of damages, owing to the conditions created by the respondent, the rabbiting rights ceased to be lettable for commercial purposes because there were no more rabbits. Further, there is a right to punitive damages on the principles stated in *Loudon* v. *Ryder.*[29] The charge of fraud was persisted in right up to this appeal. Since a man is either honest or dishonest, it is important how this charge is dealt with by the House.

Their Lordships took time for consideration.

March 24. VISCOUNT SIMONDS. My Lords, the appellant company, Shepton Mallet Transport Ld., are the owners of an agricultural estate known as the Hothorpe Estate on the borders of the counties of Northamptonshire and Leicestershire. The respondent is the tenant farmer of a farm of about 341 acres which is part of that estate. He holds this farm as tenant from year to year under a number of agreements about which it is necessary to say no more than that each of them was an ordinary agricultural tenancy and contained a reservation to the owner (subject to the provisions of the Ground Game Act, 1880) of all the game, rabbits, wildfowl and fish with liberty to himself and all other persons authorized by him to preserve, shoot, hunt, course, kill and carry away the same, and also contained an agreement by the tenant that he would not (subject to the provisions of the same Act) shoot or otherwise sport on the land. It is clear law that the so-called reservation operates as a regrant of the rights therein described in favour of the landlord and his assigns and that a profit à prendre is thereby created.

In the year 1949 the respondent's farm and the spinneys adjoining it were infested with rabbits. In that year a vain attempt was made by a firm of estate agents, Messrs. Howkins & Sons, of Rugby, on behalf of the appellant company to let the shooting, and in or about July, 1950, the appellant company

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[28] 3 App.Cas. 641, 651, 657, 660.

[29] [1953] 2 Q.B. 202, 208.

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requested the Northamptonshire Agricultural Executive Committee to gas a spinney called Coombe Hill Spinney, and this was done. But the plague of rabbits was still serious and on October 2, 1950, the committee notified the respondent that they intended to make a further survey of the farm. On October 9 the committee authorized their pests officer, a Mr. Smart, to serve notices upon both the respondent and a Mr. Bennett, the managing director of the appellant company. On October 10 Smart saw the respondent, told him of the authorization and said that, if the respondent preferred the committee to deal with the rabbits for him, an order upon him to destroy the rabbits would not be necessary. The respondent thereupon signed in pencil an agreement with the committee whereby the committee agreed at a certain charge to carry out "rabbit destruction work" on the farm, and the respondent agreed to make all necessary arrangements free of charge to enable the committee's servants to begin work as soon as possible. I do not now pause to examine the impact of this agreement upon the Ground Game Act.

At this stage the appellant Mason comes on the scene. He is an experienced rabbit catcher who still practises that trade in addition to carrying on the business of a garage proprietor. He had shortly before October 11 seen Mr. Bennett, whom I have already mentioned, about the shooting on the Hothorpe Estate and was referred by him to a Mr. Atkinson, a partner in the firm of Howkins & Sons. On October 11 Mason went over the Hothorpe Estate, was shown its boundaries by the bailiff of the appellant company named Davies, and estimated that he might catch 1,000 rabbits by the end of December and possibly another 500 to 600 rabbits by October, 1951. He accordingly saw Mr. Atkinson and after making an offer, which was not accepted, agreed with him to pay £100 for the rabbiting rights on the estate for a year. I use the expression rabbiting rights because, while it is not clear what expression was used, there is no doubt whatever that both parties meant Mason to have the right to kill rabbits by any lawful method and to take them away. Subject to the question with which I must presently deal, Mason thus became entitled in equity to a profit à prendre, viz., the right to enter upon the respondent's land and kill rabbits there, and the respondent had no possible right to gainsay him.

I must now state the fact upon which so much of this litigation has turned. After making the oral agreement with Mr. Atkinson, Mason went again to the office of Howkins & Sons, handed to a girl in the office his cheque for £100, and received a receipt which had already been initialled by Atkinson. The receipt was in the following form:—

HOWKINS & SONS
Auctioneers, Valuers, Surveyors and Land Agents.
12, Albert Street, Rugby.
11th October 1950.

No. 1383.
RECEIVED of E. Mason Esq.
The sum of......One hundred......pounds......shillings and ......pence.
Towards Bailiff's wages on Hothorpe Estate.
£100 0. 0.

HOWKINS & SONS
Auctioneers.
2d.
Valuers.
11th Oct. 1950
Received with thanks.
Rugby.

This document is relied on by the respondent as affording good ground for denying that Mason had at the relevant dates acquired the right to enter on the land and kill and take rabbits. But before I consider that question I will pursue the narrative of facts to the end.

On the same day, October 11, Howkins & Sons wrote to the respondent informing him that the appellant company had given Mason permission to shoot the rabbits on the Hothorpe Estate. This, though not an accurate description of the agreement, was sufficient to notify the respondent that Mason was authorized to enter on the land, and in fact on the following day he again visited the farm, saw the respondent and his son there, and told him that he had got the "rabbiting rights" for £100 for which he held a receipt. I do not think that the respondent was under any illusion as to what "rabbiting rights" meant. According to the evidence, the respondent appeared to be pleased at this information, but on the same day, returning to Smart a copy of the contract with the committee, which he had signed in ink, he wrote in these terms: "As I predicted months ago that "Bennett's intentions were to preserve these pests until he could "make a big price of them, my guess has come true. Today I "have seen and spoken to a man whom Bennett has sold the "rabbits to for £100. This man holds a receipt for his payment. "He has promised to bring it for my perusal when I shall make "a copy of same and you will be able to have one also if you "wish. For the Lord's sake beat him to it. He has beat you "up to now."

It may be gathered from this letter that the respondent did not intend friendly co-operation with Mason, though it is not clear why this should be so. And so it proved, for on October 15, Mason being in a field on the estate with three companions looking for rabbits in the hedge, the respondent rode up on his horse, and in the words of Mason, whom the learned judge accepted as a witness of truth: "He behaved like a lunatic. He "flew at me. He ordered me off altogether. Clarke wanted to "fight. He was on us all." He left no doubt of his avowed intention that Mason should not get any rabbits on his land. I do not propose to occupy your Lordships' time by a detailed account of the respondent's behaviour. It is clear that by such provocative conduct as I have described and by upsetting the snares set by Mason on his farm he did his utmost to prevent him exercising the rights for which he had paid. Nor was he content with that measure of interference; for it was established beyond all doubt by the evidence that on more than one occasion he killed rabbits, or caused them to be killed, to an extent which his rights under the Ground Game Act did not warrant.

It appears that at some time the respondent had authorized in writing one Geoffrey Mason (no relation of the appellant) to kill rabbits for reward, and this authority, though not produced, was still extant and was acted on in October, 1950. If so, no other outside person could be so authorized at the same time, and I see no justification for a contemporaneous authority being given, if indeed one was given, to the Agricultural Executive Committee. But, apart from this, Geoffrey Mason was on at least one occasion accompanied by two other men, who were not and could not have been authorized to kill rabbits, and there was no evidence upon which a court could properly come to the conclusion that they were assistants of Geoffrey Mason and needed no authority.

It may appear to your Lordships that in these circumstances Mason acted with commendable self-restraint. On December 3 he cleared all his snares off the respondent's farm and did not lay any more there.

On December 30, in order to perfect his legal title, and with a view, one may surmise, to the legal proceedings which he commenced on the following January 4, the appellant company and Mason executed a memorandum under seal by which it was witnessed that it had been, on October 11, 1950, agreed between them that the company granted to Mason (subject to the provisions of the Ground Game Act, 1880) the exclusive right for himself, his servants and licensees, of shooting, hunting, coursing and killing rabbits on the Hothorpe Estate for the period of one year from October 11, 1950, and that Mason would pay for that right the sum of £100, the receipt of which was thereby acknowledged. The memorandum also referred to an agreement that any director of the appellant company might by arrangement shoot rabbits on the estate. It was not accurate to say that this term had been agreed on October 11, 1950: it had in fact been agreed a little later. But this does not affect the validity of the deed.

On January 4, 1951, as I have said, Mason commenced proceedings against the respondent claiming an injunction to restrain him (subject to the provisions of the Ground Game Act) from interfering with his profit à prendre and for damages. On April 4, 1951, the appellant company was added as plaintiff, presumably because it was unlikely that this action would be tried before October, 1951, and the appellant company's reversionary interest was threatened by the respondent's attitude. And a further injunction was claimed to restrain the respondent shooting or otherwise sporting upon the land except in accordance with the provisions of the Ground Game Act, 1880. The earlier injunction looked to the terms of the reservation, the latter to the terms of the covenant.

My Lords, it must, I think, have appeared that Mason and the company had a very clear case when this action was started. Mason had an agreement with the appellant company, which they did not challenge, for the exercise of the rabbiting rights which had been the subject of reservation and regrant. He had an agreement which was apparently valid and he had forthwith gone into possession of his profit à prendre, so far as the subject-matter admitted of possession, by going round the estate with the company's bailiff, informing the occupying tenant farmer of his position and laying a large number of snares. And he had by the conduct of the respondent been debarred from exercising his rights.

It is necessary, then, to look at the defences which, though they were one and all rejected by the trial judge, found favour with the Court of Appeal.

The defence which the respondent put in the forefront of his case must first be examined and, as it involved a charge of fraud, it is right first to see what were the specific allegations. They were that on or about October 12, 1950, Mason saw the respondent on his farm and orally stated to him that, in compliance with a request by the appellant company's agents (meaning thereby Howkins & Sons) that he should do so, he had agreed to the rent being described in the said receipt as bailiff's wages in order to enable them to conceal from His Majesty's Inspector of Taxes a receipt of rent. It was then pleaded that, relying on the contents of the receipt and Mason's oral statement, the respondent would say that the agreement was unlawful because it was made in fraud of His Majesty's Inland Revenue in that it concealed a taxable receipt of rent and was therefore ineffectual to confer upon Mason any enforceable rights over the respondent's land.

My Lords, this grave charge, which involved not only the appellants but also the firm of Howkins & Sons and in particular Mr. Atkinson, the member of the firm who dealt with the matter, begins with the allegation that on October 12, 1950, Mason saw and made an oral statement to the respondent describing the fraud that it was intended to perpetrate. Here was a pure question of fact upon which the trial judge, having heard and seen the witnesses, including the respondent's son, who faithfully corroborated what his father had said, unhesitatingly accepted Mason's evidence that he had said no such thing. I can see no ground for saying that this finding of fact ought to be challenged. On the contrary, since Mr. Atkinson, whose integrity was not challenged, denied having made the alleged request, it seems inherently unlikely that Mason should have invented it. I here interpolate that, as I think quite improperly, a suggestion was made in the course of the trial that Mason had been requested by Mr. Bennett at their first meeting to join him in falsifying the receipt. For this also there was no foundation.

But, my Lords, these allegations being out of the way, what remains? There remains nothing but the receipt itself, and it is upon this alone, disregarding all other evidence, that the Court of Appeal came to the conclusion that the agreement was so tainted with fraud that Mason could not rely on it and therefore could not be regarded as entitled in equity during the relevant period to a profit à prendre. I must state at once my emphatic dissent from this conclusion. Denning L.J. was satisfied that the receipt was patently false and could only infer that it was done with a dishonest motive and did not think it necessary to inquire into the precise motive. It was in his view enough that the false receipt was knowingly false and done (as he inferred) with some dishonest motive, and that Mason took it without making any objection to it. Romer L.J. was more specific: for he held that its only purpose was to facilitate a fraud on the Inland Revenue and that it was apparent to anyone with knowledge of the facts, who saw it, that such was the object and that, as Mason saw it and retained it in his keeping, it must have been apparent to him. So far at least the conclusion is that Mason could not rely on the agreement because he was himself aware of, and therefore a party to, the fraud, and I will first examine that aspect of the case, though, as your Lordships will see, at a later stage Denning L.J., but not Romer L.J., appeared to hold that, whether or not Mason was aware of it, the document was in fact fraudulent and therefore he could not rely on it: this proposition was strenuously urged at the Bar.

My Lords, I should hesitate long before saying that a statement is inspired by a dishonest motive if I could not say what that motive was, nor should I say that its purpose was clearly to defraud the Revenue if every attempt to show how the Revenue could be defrauded by it conspicuously failed. But the question is whether it was, or perhaps ought to have been, clear to Mason from the apparently innocuous words on the receipt "towards bailiff's wages" that a fraud on the Revenue was intended. In the first place, his own evidence that he did not know or suspect anything of this kind was accepted by the trial judge. But in the second place we have the testimony of Mr. Atkinson. The respondent's counsel properly and expressly disclaimed any attack upon his bona fides or integrity, but it became somewhat difficult to reconcile this disclaimer with the persistent argument that the receipt carried on its face the aspect of dishonesty. Mr. Atkinson agreed that, when he had instructions from Mr. Bennett to have the receipt made out in this form, he thought about it and that he had thought about it since, and he said that then and now he saw nothing wrong. It was, he said, for his (Bennett's) domestic arrangement and he made the receipt out accordingly. This being the attitude of a professional man who had ample time for reflection upon it, and whose integrity is not impugned, it is somewhat surprising that it should be said of Mason, garage proprietor and rabbit catcher, that he was or should have been alive to the sinister import of the document. Nor does the matter end there, for a Mr. Lumley, the secretary of the appellant company, a Fellow of the Society of Incorporated Accountants and Auditors, made it clear that Mason's payment of £100 would be disclosed in the books of the company as a taxable receipt, which could either be assessed under Case VI of Schedule D, or as a deduction against any claim the company might have for maintenance, and that in the long run it would not make any difference which course was adopted. These are mysteries, my Lords, into which you may not think it necessary to penetrate. I do not myself think it necessary to do so in order to be satisfied that Mason did not detect and could not be expected to detect any dishonest motive, specific or general, in those three words.

Mason, then, a party wholly innocent of any fraud, was entitled to enforce his agreement unless two things are established, the first that the other party to the transaction was fraudulent, and secondly, that that party's fraud by itself debarred him from his rights. My Lords, I will deal with these matters very shortly. Mr. Bennett was criticized for not having appeared as a witness to explain why he wanted the receipt in this form. As events turned out, it would have been better if he had. But he was at Birmingham in court when the case was first called on. It was adjourned to be heard in London at a later date and, when it came on again, he was engaged in some business on the Continent. I decline on that account to come to the conclusion that he was fraudulent, and it may be said in his justification that in his absence the trial judge took a by no means unfavourable view of his conduct. But, finally, supposing that he had some dishonest motive, as I hold he had not, what follows? Denning L.J., relying, I think, on the case of *Alexander* v. *Rayson*,[1] concluded that Mason also was affected, or perhaps I should say infected, by the taint and could not rely on his agreement. My Lords, I do not think that the case cited, or any other case such as *Miller* v. *Karlinski*,[2] to which reference was made at the Bar, decides anything of the kind. In the latter case the agreement itself, of which the impugned term was an inseverable part, was illegal, and it followed that the court would not decree specific performance of it. In the agreement which Mason is assumed to be seeking to enforce there is no illegality. In *Alexander* v. *Rayson* [3] it was treated as settled law—and it could not be otherwise—that a plaintiff having intention to use the subject-matter of an agreement for an unlawful purpose cannot sue upon it, and the only relevant question was whether a plaintiff having a similar intention in regard to the documents evidencing an agreement is similarly debarred. And it was held, I do not doubt correctly, that he was. But it was not suggested there that an innocent party is debarred by the other party's fraudulent intention from enforcing an agreement which is not itself illegal.

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[1] [1936] 1 K.B. 169; 52 T.L.R. 131.

[2] (1945) 62 T.L.R. 85.

[3] [1936] 1 K.B. 169.

I have devoted much time to this question but not, I hope, too much, for charges of fraud should not be lightly made or considered.

I conclude that this plea, which, as I say, was put in the forefront of the defence, fails.

The next plea that I must examine is of a technical character and, as I have had the privilege of reading what my noble and learned friend, Lord Morton of Henryton, has to say about it and agree with him, I need say little. The plea, as I understand it, is that Mason had, before December 30, 1950, neither a legal right nor a right enforceable in equity to the profit à prendre and therefore could not complain of any interference with the exercise of his rights. It is true that he had no legal title, but I concur with my noble friend in thinking, for the reasons that he gives, that Mason had a clear equitable title. If and so far, therefore, as it is necessary to buttress actual possession of a profit à prendre with a title of ownership, that condition is in this case fulfilled and this plea also fails. I express myself with this qualification, for as was said in *Bristow* v. *Cormican*,[4] possession " for however short a period " (*per* Lord Cairns L.C.[5]) " the slightest amount of possession " (*per* Lord Hatherley [6]) of a profit à prendre is sufficient to support an action for trespass against a wrongdoer, and in the view which I take and have already expressed Mason was in possession of the profit à prendre and the respondent was none the less a trespasser upon that incorporeal hereditament because he was himself the occupier of the land and had certain rights under the Ground Game Act. I should not therefore myself have thought it necessary to consider more than the possessory title, but inasmuch as the matter has been put in issue I wish to express my concurrence with the noble Lord.

The respondent next sought to justify his interference with the exercise by Mason of his rabbiting rights by pleading that the reservation or regrant to which I have already referred did not upon its true construction confer any right to lay snares in the open fields of the respondent's farm. Upon this plea also the Court of Appeal looked favourably. Denning L.J. held [7] that the respondent was not precluded from " 'carrying out any reasonable " 'and normal operations which might be deemed advisable for " 'the purpose of dealing with the land to the best advantage as " 'farming land,' " see *Peech* v. *Best*,[8] and he must, I think, have meant to include the removal of Mason's snares as at least a reasonable if not a normal operation. Romer L.J. held [9] that it was not "a reasonable exercise of sporting rights to lay down "quantities of snares in pasture that is occupied by sheep, except "by arrangement with the farmer." This plea had a double edge, for it was used on the one hand to justify the respondent in his objection to the use by Mason of snares, and on the other to excuse the steps which he took in excess of his rights under the Ground Game Act to destroy the rabbits himself.

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[4] (1878) 3 App.Cas. 641.

[5] Ibid. 651.

[6] Ibid. 657.

My Lords, I regret that at this point also I cannot uphold the decision of the Court of Appeal. In my opinion, the only conclusion to which, upon the evidence before the court, it is proper to come is that to which the trial judge came. Mr. Atkinson, to whom I have already referred, said that he had never before in his experience heard of any trouble about snares with sheep, and added that it was "normally done" to set snares where there are sheep, that it was a common practice in his district, and that he had never heard it suggested it was an improper practice. Mason, who spoke out of a very long experience, gave evidence to the same effect. So did a Mr. Edwards, a gamekeeper of more than 50 years' experience. It is true that a veterinary surgeon spoke of having had a Labrador dog which had several times caught its leg in a snare, and that the respondent's daughter gave evidence that early in December she had found a number of sheep with wires attached to their legs (an incident which was the subject of a counterclaim by the respondent which he subsequently abandoned), but the learned trial judge, having taken these and other matters into consideration, concluded that it was a proper exercise of rabbiting rights to lay snares in fields where sheep pastured. In my opinion, he was undoubtedly right. It follows that the respondent fails in this plea also, and I want only to add a word upon the case of *Peech* v. *Best*.[10]

In *Peech* v. *Best* [10] the facts were that the owner of a farm containing 700 acres granted to a grantee the exclusive right of shooting and sporting over the farm and entered into a covenant with him for the quiet enjoyment of that right. He then sold 12 acres, part of the 700 acres, to a purchaser who intended to use it as a training stables for racehorses and forthwith erected thereon two houses and 36 loose boxes for horses. It was clear that this was detrimental to the exercise of shooting rights over the 12 acres and perhaps over a wider area, and the question was whether the grantee of those rights could recover damages. He had acquired a right which was a profit à prendre, an incorporeal hereditament, which he was entitled to protect from injury either from his grantor or any third party. Since his rights were in respect of farm land, he could complain of no act on the part of the grantor which could be considered the ordinary, natural and reasonable use of farm land. But the conversion of 12 acres into racing stables, and the erection of numerous buildings, was not such use, and he was therefore entitled to recover damages. For, as Scrutton L.J. said,[11] " . . . both landlord and sporting " tenant must use their land reasonably having regard to the " interest of the other, and will be liable for damage caused to the " other by extraordinary, non-natural, or unreasonable action." That is the whole matter, and, in my opinion, the evidence overwhelmingly supported the view that Mason did not act in an extraordinary, non-natural or unreasonable manner, and that, on the other hand, those epithets would be a mild way of describing the action of the respondent.

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[7] [1954] 1 Q.B. 460, 467; [1954] 1 All E.R. 189.

[8] [1931] 1 K.B. 1, 18; 46 T.L.R. 467.

[9] [1954] 1 Q.B. 460, 473.

[10] [1931] 1 K.B. 1.

I now come to the question of remedy. The appellants, as I have said, claimed an injunction and damages. The learned judge declined to grant an injunction but awarded damages, to the company £50, and to Mason £150: of the latter sum £50 was special damage and £100 general damage. So far as concerns the £50 special damage, it was agreed by counsel at your Lordships' Bar, that, though at one time during the trial the judge was minded to refer any question of special damage and did not permit cross-examination to that issue, he was at a later stage invited by counsel to make such award as he thought fit. Under these circumstances I think that your Lordships will not consider it right to disturb his award. The award of £100 under the head of general damage is, I think, open to criticism only on the ground that it might well have been a larger sum. It can by no means be regarded as so extravagant as to justify an appellate court in setting it aside.

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[11] [1931] 1 K.B. 1, 14.

The award of damages to the appellant company presents a more difficult problem. Their cause of action was not for interference with the rabbiting rights, for ex hypothesi Mason was in possession at the critical time: their interest was then reversionary. But the respondent had clearly acted in breach of his covenant that he would not shoot or sport on the farm, for he had authorized the killing and taking of rabbits by means of ferreting and dogs in excess of any rights he enjoyed under the Ground Game Act. Here the appellant had a good cause of action, but the learned judge at an early stage in his judgment said that no damages had been proved, and that no attempt had been made to prove them, and I think that he was right in saying so. In these circumstances he was not, in my opinion, justified in making an award of £50 damages upon the single ground, as I read his judgment, that the respondent had by his defence raised a plea of fraud, which, though it did not commend itself to the learned judge or to your Lordships, nevertheless was sustained in the Court of Appeal. This is remote, indeed, from the principle which was applied in *Merest* v. *Harvey* [12] or, more recently, in such cases as *Loudon* v. *Ryder*.[13] On the other hand, I do not understand why the appropriate remedy of an injunction was not granted. It is no longer of any use to Mason whose rights have long since expired. He will retain the damages awarded to him. But I shall invite your Lordships to vary the learned judge's order by excluding the award of damages to the company and substituting an injunction in the form claimed in paragraph 2 of the statement of claim, except that the reference to the Ground Game Act, 1880, should be extended by including some such words as "or any other relevant statute."

I move, therefore, that the order of the Court of Appeal be reversed, and the judgment of the learned judge restored with the variation that I have indicated. The respondent must pay the appellants' costs here and in the Court of Appeal.

LORD OAKSEY. My Lords, I have had the advantage of reading the opinion which has just been delivered by my noble and learned friend on the Woolsack, and also the opinion of my noble and learned friend, Lord Morton of Henryton, and I entirely agree with them, and have nothing to add.

LORD MORTON OF HENRYTON. My Lords, I do not know why Mr. Bennett instructed Mr. Atkinson to give Mr. Mason a receipt in the form which has already been read. I could make a guess at Mr. Bennett's reason but my guess might be wrong. In my opinion, however, the rights of Mr. Mason and the appellant company in this action are in no way dependent upon an investigation of Mr. Bennett's reason. The appellant company's rights against the respondent arise under the reservations and covenants contained in the agreements under which the respondent became the tenant of his farm. The terms of these reservations and covenants have already been read and I shall not repeat them. I agree that the appellant company is entitled to an injunction in the terms proposed by my noble and learned friend on the Woolsack, for the reasons which he has stated.

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[12] (1814) 5 Taunt. 442.

[13] [1953] 2 Q.B. 202; [1953] 1 All E.R. 741.

I now turn to the position of Mr. Mason. It is clearly established by oral evidence that on October 11, 1950, an oral agreement was entered into between the appellant company, acting by its duly authorized agents, and Mr. Mason, whereby it was agreed that in consideration of the sum of £100 Mr. Mason should have the right to kill and take rabbits on the Hothorpe Estate for a year from October 11, 1950. That right was, of course, a profit à prendre. The £100 was paid on the same day. It is also clearly established by oral evidence that on October 14, in exercise of his right under the agreement, Mr. Mason went on the Hothorpe Estate and set snares thereon for the purpose of catching rabbits and returned next day with two men, employed and paid by him, to take rabbits. It is also beyond dispute that the respondent interfered with Mr. Mason's exercise of his rights under the agreement by the acts already described by my noble and learned friend on the Woolsack, and thereby caused damage to Mr. Mason.

A profit à prendre is an interest in land, and no legal estate therein can be created or conveyed except by deed (Law of Property Act, 1925, s. 52). At the time when the respondent did the acts of which complaint is made, there had been no grant by deed of the profit à prendre to Mr. Mason, but prima facie he had the benefit of an oral agreement for the grant thereof, and he had entered into possession thereof in the only possible way, viz., by exercising his rights thereunder.

It is said on behalf of the respondent, first, that the agreement was so tainted with fraud that it was ineffectual to confer any enforceable rights; secondly, that the agreement, on its true construction, did not confer any right to lay snares in the open fields let to the respondent, and thirdly, that at the time when the respondent did the acts in question Mr. Mason's agreement with the appellant company was unenforceable by action, because there was no memorandum or note thereof in writing sufficient to satisfy section 40 of the Law of Property Act, 1925.

My Lords, the first two of these arguments have already been fully dealt with in the speech from the Woolsack, and I desire to add nothing in regard to them. As to the third argument, I am inclined to agree that there was no sufficient memorandum until December 30, 1950, but it is unnecessary to examine the relevant documents in detail because I am quite satisfied that the acts of Mr. Mason, already described, were a part performance of the oral agreement of October 11, 1950. Mr. Mason set snares, took rabbits and paid helpers, and, in my view, the work done and the expense incurred were exclusively referable to the oral agreement. Accordingly, at the relevant time Mr. Mason had a contract, specifically enforceable against the appellant company, for the grant of a profit à prendre, and had entered into possession thereof. In these circumstances he was clearly entitled to bring an action for trespass against the respondent: see *Holford* v. *Pritchard*[14] and *Fitzgerald* v. *Firbank*.[15]

I agree with the motion proposed.

Lord Reid. My Lords, this case arises out of a simple transaction of no great importance. The appellant, Mr. Mason, is an expert rabbit catcher. In 1950 he wished to get the right to catch rabbits on an area of about 450 acres known as the Hothorpe Estate, which belonged to the appellant company. The greater part of that area consists of a farm of which the respondent, Mr. Clarke, is tenant: in his leases there was reserved to the landlord, subject to the provisions of the Ground Game Act, 1880, all the game, rabbits, wildfowl and fish, and the leases contained covenants by the tenant not to shoot or otherwise sport on the land.

Mr. Mason approached Mr. Bennett, a director of the appellant company, and was referred by him to Messrs. Howkins & Son, who acted as land agents for the company. He saw Mr. Atkinson, a partner of the firm, who says that he had already discussed the matter with Mr. Bennett. Mr. Mason and Mr. Atkinson agreed that Mr. Mason should have the right of rabbit shooting for one year for £100. There is no doubt that it was understood that this right included the right to take rabbits in any legitimate way. Mr. Mason made out a cheque for £100 and when he left a clerk gave him a receipt. The receipt was in this form: "Received of E. Mason, Esq., the sum of one hundred "pounds towards Bailiff's wages on Hothorpe Estate."

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[14] (1849) 3 Exch. 793.

[15] [1897] 2 Ch. 96; 13 T.L.R. 390.

Mr. Atkinson was rightly accepted by counsel for the respondent at the trial as a credible witness. He said that he had been instructed by Mr. Bennett to make out the receipt in this form, that he thought about it at the time but could see nothing wrong and so he carried out his instructions. It is now said that this receipt was a dishonest document, that it disclosed an intention to attempt to defraud the Revenue, that this must have been apparent to Mr. Mason and that the giving and taking of a receipt in these terms so tainted the whole transaction that Mr. Clarke cannot now be sued in respect of his having interfered with Mr. Mason's exercising his rights under it to take rabbits on Mr. Clarke's farm.

In the course of the argument before your Lordships counsel for the respondent was asked what he submitted that Mr. Mason ought to have done on receiving this receipt, and I understood him to reply that Mr. Mason ought to have refused to go on with the transaction, and that if he had done so he was entitled to get his money back: merely to get another receipt in different terms would not have saved the transaction because perusal of the receipt had fixed Mr. Mason with knowledge of the fraudulent purpose. I shall assume for the purpose of argument that if Mr. Mason had been given a document which plainly disclosed an intention to falsify the company's accounts, and if he had understood that that was the intention, he ought to have taken the course which counsel suggested, and that if he proceeded with the transaction he did so at his peril.

But I cannot see any ground for inferring a fraudulent or dishonest intention from the terms of this receipt. It is not suggested that there was any intention to conceal the receipt of the money, or that the receipt indicates any such intention. That could not have been done without the connivance of Mr. Lumley, a Fellow of the Society of Incorporated Accountants and Auditors, who was secretary of the company and who prepared the accounts of the company and dealt with its tax liability. There has never been any suggestion against Mr. Lumley's honesty or capacity, and the suggestion must be that if Mr. Lumley had been informed that this £100 was a contribution to the bailiff's wages he would have prepared the accounts in a way more advantageous to the company than he would have done if informed that the £100 was a shooting rent. In fact, a charge of fraud had been made and was known to Mr. Lumley before he made up the accounts.

But it is important to see how he dealt with this receipt in the accounts, because counsel was unable to suggest any other or more advantageous way in which he might have dealt with it if he had had no other information than that it was paid towards the bailiff's wages. The receipt was entered in the company's property revenue account. On the one side of this account there were entered wages, repairs, rates, and other expenditure, and on the other side rents receivable. This £100 was entered as a deduction from the item " wages." If it had been treated as a rent it would have been entered on the other side of the account among rents receivable. But the result so far as this account is concerned would have been exactly the same: there would still have been the same deficiency on the whole account, £388 9s. 7d., to carry to the general profit and loss account. But counsel argued that treating the £100 as a deduction from wages paid instead of as a rent received would or might in some way lead to a smaller tax liability. I can claim no special knowledge of accountancy, and I can only say that it is not clear to me how this could be, and I could not hold that the form of this receipt was evidence of an intention to defraud the Revenue without being able to see some possible way in which showing the £100 as a deduction from wages instead of as a rent would decrease the company's tax liability.

Then it was said that if a person puts a wrong description of this kind in a receipt or in his books it is to be presumed that he did so with some dishonest intention even if it cannot be made clear what that intention was or could have been. In other words, vague suspicion is as good—or as bad—as actual evidence of fraudulent or dishonest intention. I am bound to say that this strikes me as both novel and erroneous. But before proceeding farther I must note the course which this case has taken.

As things have turned out it is unfortunate that Mr. Bennett did not give evidence. But I do not think that he is to blame for that. The charge of fraud or dishonesty appears to have been made first in police court proceedings in February, 1951. We do not know in what precise form the charge was then made, but in the defence to the present action dated May 26, 1951, the charge is stated in paragraphs 5 and 6 in these terms: " 5. On or about " October 12, 1950, the first plaintiff saw the defendant on his " said land and orally stated to the defendant that, in compliance " with a request by the second plaintiffs' said agents that he " should do so, he had agreed to the rent being described in the " said receipt as bailiff's wages in order to enable them to conceal "from His Majesty's Inspector of Taxes a receipt of rent. "6. Relying upon the contents of the said receipt and the first "plaintiff's oral statements as aforesaid, the defendant will say "that the said agreement was unlawful because it was made in "fraud of His Majesty's Inland Revenue in that it concealed a "taxable receipt of rent and that it was therefore ineffectual to "confer upon the first plaintiff any enforceable rights over the "defendant's said land."

That clearly means that Mr. Mason stated that Mr. Atkinson had asked him to agree to the form of the receipt, and that Mr. Atkinson made this request and was understood by Mr. Mason to make this request for a fraudulent purpose. Mr. Bennett was not present when Mr. Atkinson met Mr. Mason; there was no allegation against Mr. Bennett in the defence, and all that he could have said was to state the instructions which he had given to Mr. Atkinson. He may well have been content to rely on Mr. Atkinson's evidence, and in fact Mr. Atkinson's evidence, being accepted as credible, disproved the allegation in the defence: it proved that the form of receipt was not discussed by him with Mr. Mason and that he, Mr. Atkinson, had himself no dishonest or fraudulent intention and had no knowledge or belief of any such intention on the part of Mr. Bennett when he caused the receipt to be made out as it was. The reason why Mr. Bennett did not give evidence was that the case was to have been tried in Birmingham, but after the witnesses had wasted three days waiting there it was decided that the case should be tried in London at a later date, and when the case was tried Mr. Bennett was in Spain on other business. In these circumstances it would, I think, be unreasonable to suggest that Mr. Bennett ought to have been present to give his evidence.

The allegation in paragraph 5 of the defence is not that Mr. Mason made the alleged agreement but that on October 12 he told Mr. Clarke that he had done so. I therefore turn to the evidence regarding their meeting on that occasion. Mr. Mason's evidence was that he told Mr. Clarke that he had paid £100 and had got a receipt giving him authority to catch rabbits, but that he did not show him the receipt or discuss what was in it or say anything about income tax. In cross-examination it was not put to him that he had said that he had agreed with Mr. Atkinson to accept the receipt—that had already been disproved by Mr. Atkinson. What was put to him was that he said to Mr. Clarke: "As a matter of fact, when you see the "receipt you will see it is for bailiff's wages," and that when

Mr. Clarke asked why, he replied: "It is something to do with "avoiding income tax." This was flatly denied by Mr. Mason. Mr. Clarke's version is that after disclosing, in the course of a conversation of some length, that the receipt was for bailiff's wages Mr. Mason said: ". . . I have a good lot of business to do "myself but I know that things should not be receipted in that "manner," and that when asked why it was worded in that manner Mr. Mason said he thought it was to "put it round the "Inland Revenue people." Mr. Clarke then added: ". . . those "are the very words he said to me." Mr. Clarke agreed in cross-examination that Mr. Mason did not say anything about having been requested by Messrs. Howkins to accept the receipt in order to avoid tax, and then, for the first time, he brought in Mr. Bennett's name. I quote the relevant question and answer: "Q. Did he say anything about anyone at Messrs. Howkins "having asked him to enter into the agreement in any special "form? A. He said he had made the agreement with Mr. "Bennett. That is what he told me."

My Lords, perhaps I ought not to have occupied time in setting out this evidence because Croom-Johnson J. said more than once in the course of his judgment that where the evidence of Mr. Mason and Mr. Clarke conflicted he accepted the evidence of Mr. Mason. But counsel for Mr. Clarke invited your Lordships to take a different view, partly because Mr. Clarke's evidence was corroborated by his son. The son gave a shorter account of the conversation but stated that Mr. Mason had said of the receipt: "It is worded like that to go round the income "tax people." Nevertheless, having read the whole of the evidence of Mr. Mason and Mr. Clarke, I see no reason at all to question the finding of the learned judge on their credibility.

Even if it were possible to accept Mr. Clarke's evidence—other than his belated statement bringing in Mr. Bennett, which is plainly an afterthought—I should have great doubt whether he could be permitted to change his ground in this way in a matter involving a charge of fraud. The charge made in the defence was that Mr. Mason had made a dishonest agreement with Mr. Atkinson, but the only case which can now be made is that Mr. Bennett had a corrupt intention in instructing Mr. Atkinson to make out the receipt in false terms, and that, although Mr. Atkinson, an experienced professional man, failed to detect that intention after giving thought to the matter, Mr. Mason was astute enough to infer the fraudulent purpose from the terms of the receipt. But I need not pursue that matter because Mr. Mason's account of the matter was accepted by Croom-Johnson J. and is straightforward and, to my mind, entirely credible. When cross-examined he said that he was satisfied with the receipt as being in order; he had got a stamp on the receipt for £100 and that was all he was interested in, and what Mr. Bennett did with the £100 was no concern of his. He did not admit that he suspected that Mr. Bennett had any fraudulent purpose.

But even if he had had some vague suspicion I do not know what he could have done. Was he to take the grave step of demanding his money back on the ground that the receipt showed that the appellant company or Mr. Bennett had a fraudulent purpose in accepting it? I should have thought it plain that it would have been not only foolish but wrong of him to make such an accusation on such flimsy material. But that is the course which the respondent has to submit that he ought to have taken. In my judgment, no fraudulent or dishonest purpose has been proved against either Mr. Mason or Mr. Bennett.

As I am differing from a unanimous judgment of the Court of Appeal in this matter, I think that I ought to state explicitly my reasons. Denning L.J. says that the statement in the receipt was false, that Mr. Bennett was never called to say why he wanted a receipt made out in that way, and that the court had been left completely in the dark about it. I have already explained why I think that, in view of the form of the allegation in the defence, there was no compelling reason for Mr. Bennett to give up his foreign engagements to give evidence. Then the learned Lord Justice said that in the absence of any explanation of this patently false receipt he could only infer that it was done with a dishonest motive, but that he did not propose to inquire into the precise motive. If it were clear that there were several ways in which the receipt, or the method of describing the money, could be used to achieve a dishonest purpose, I would agree that it would not matter which method Mr. Bennett had in mind. But where there is no obvious method by which any dishonest purpose could be achieved, I do not think it right to say on this evidence that the purpose must have been dishonest. The purpose may equally well have been honest. For example, Mr. Bennett might have thought that, in view of the small income from the estate, continuing to pay the bailiff's wages could not be justified unless he could get in some additional income, and that any additional income which he could collect should be earmarked to be set against that expense. I do not

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say that that is more than a possible explanation, but it seems to me to be about as probable as that Mr. Bennett has hit upon some device to escape tax which no one has yet been able to explain. Then the learned Lord Justice does not say that Mr. Mason knew that the purpose was dishonest or even that he ought to have known: he says that the false receipt taints the whole of Mr. Mason's authority, and refers to *Alexander* v. *Rayson*.[16] In that case the lessor, who had prepared false documents with a fraudulent purpose, was held not entitled to sue on them. But if the lessee, who was innocent, had brought an action to enforce covenants in her favour I find nothing in that case to indicate that her action would have failed. I therefore think that that case does not support the judgment of Denning L.J. unless he intended to find not only that Mr. Bennett had a fraudulent purpose but also that Mr. Mason was aware of it.

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As I read his judgment, Romer L.J. did find that Mr. Bennett's purpose was to effect a fraud on the Inland Revenue, and also that Mr. Mason was aware of that. He said that in the absence of an alternative explanation he could not avoid the conclusion that the one and only purpose of the form of the receipt and corresponding entry in the company's books was to facilitate a fraud on the Inland Revenue, but unfortunately he did not explain how this form would enable that to be done. Then he said that that is apparent to anyone with knowledge of the facts who sees the receipt and that, as Mr. Mason saw it, it must have been apparent to him. The learned Lord Justice did not deal with the point that, if that be so, it must also have been apparent to Mr. Atkinson but that Mr. Atkinson said in evidence that after thinking over the matter it was not apparent to him, and Mr. Atkinson was accepted by the respondent's counsel as an honest witness. I can only add that after hearing a full and careful argument by the respondent's counsel it is still not apparent to me.

On the other points in the case I agree with your Lordships and I cannot usefully add anything. I would only say in conclusion that it is extremely regrettable that heavy costs should have been incurred in a case of this kind, but that if a party makes a charge of fraud the case assumes an importance far beyond any sum of money involved. I agree with your Lordships that this appeal must be allowed.

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[16] [1936] 1 K.B. 169.

LORD KEITH OF AVONHOLM. My Lords, concurring as I do in the result at which your Lordships have arrived, I would express my view only on two points which have been canvassed in the course of this appeal.

Much of your Lordships' attention has been necessarily and properly directed to the matter of the alleged fraud in the agreement. That some purpose lay behind the terms of the receipt given to Mason and the subsequent entries in the company's books is, I should think, clear. But that Mason was a party to that purpose is a proposition with which I can in nowise agree. The learned trial judge has acquitted Mason of any participation in or knowledge of any fraud. The receipt which Mason received was a plain acknowledgment of the payment of £100 by him to the company and was duly stamped, and the words "Towards "bailiff's wages on Hothorpe Estate" were not, in my opinion, of themselves such as would suggest to Mason an intention on the part of the company to perpetrate a fraud on the Revenue or anyone else. It is fundamental that fraud, or participation in fraud, must be proved by clear and cogent evidence. So far as Mason is concerned that attempt entirely fails. If so, fraud disappears as a defence in the action. The company's rights depend on the reservation and the tenant's covenant in the matter of sporting rights. But in any event I could not hold that the terms of the receipt and the subsequent entries in the company's books evidenced any fraudulent intention on the part of the company or raised any presumption of fraud against it. There is no evidence that the receipt was ever used, or attempted to be used, for any fraudulent purpose.

Fraud being out of the way, Mason's title to sue the action is, in my opinion, unimpeachable. I base my view on the fact of possession following on an agreement with the person (the company) in right to grant the profit à prendre. I should have hesitated to hold that mere purported enjoyment of the subject-matter of such a right, unattached to any title, was sufficient to establish possession that would warrant an action of trespass. But it is not necessary here to support Mason's title to sue on bare possession, and, accordingly, it is not necessary to go further into this question.

I agree that the appeal should be allowed.

Appeal allowed.

Solicitors: *Farrer & Co. for Phipps & Troup, Northampton; Ellis & Fairbairn.*

[HOUSE OF LORDS.]

INLAND REVENUE COMMISSIONERS . APPELLANTS;
AND
UNIVERSAL GRINDING WHEEL CO. LD. RESPONDENTS.

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March 14, 15, 30.

Revenue — Profits tax — Company — Preference shares redeemed at premium—Premium not a "distribution" for purposes of profits tax—Sum applied in reducing share capital—Finance Act, 1947 (10 *&* 11 *Geo.* 6, *c.* 35), *s.* 36 (1), *proviso.*
"Applied." Company.

The meaning of a distribution for the purposes of profits tax is defined by section 36 (1) of the Finance Act, 1947, the proviso stating: "Provided that no sum applied in . . . reducing the share "capital of the person carrying on the trade or business shall be "treated as a distribution."

The £1 preference shares of a company were, by its articles of association, redeemable at 27s. In 1947 they were redeemed at that figure, the 7s. premium being paid out of profits as required by the articles and section 46 of the Companies Act, 1929. The company was assessed to profits tax on the 7s. premium on the basis that it was a "distribution" for the purpose of that tax within the meaning of section 36 (1) of the Finance Act, 1947:—

Held, that since the company could redeem the shares only by paying 27s. in respect of each and the immediate effect of the act of redemption was to reduce its capital, the 7s. was a sum "applied "in . . . reducing the share capital" of the company and was therefore excluded by the proviso to section 36 (1) of the Act of 1947 from being treated as a distribution.

In re Serpell & Co. Ld. [1944] Ch. 233; 60 T.L.R. 309 approved.

Decision of the Court of Appeal [1954] Ch. 117; [1953] 2 All E.R. 1592 affirmed.

APPEAL from the Court of Appeal (Singleton and Birkett L.JJ., Hodson L.J. dissenting).

This was an appeal from an order of the Court of Appeal dated November 27, 1953, dismissing an appeal by the appellants, the Commissioners of Inland Revenue, from an order of the Chancery Division of the High Court of Justice (Upjohn J.), dated May 7, 1953, whereby an appeal by them on a case stated by the Commissioners for the Special Purposes of the Income Tax Acts was dismissed and the determination of the commissioners affirmed. The matter arose on an assessment to profits tax on the respondent company, Universal Grinding Wheel Co.

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* *Present*: VISCOUNT SIMONDS, LORD PORTER, LORD MORTON OF HENRYTON, LORD REID and LORD COHEN.

Ld., in respect of the profits of its business for the accounting period of 12 months ending September 30, 1948.

The facts, stated by Viscount Simonds, were as follows: The company was incorporated on March 8, 1935, with a capital of £600,000 divided into 400,000 5 per cent. cumulative participating preference shares of £1 each and 400,000 ordinary shares of 10s. each.

Under article 8 of the company's articles of association provision was made in accordance with the powers granted by section 46 of the Companies Act, 1929, for redemption of the preference shares. Clause A of the article provided (inter alia) "that in any event any amount to be applied in redemption of "the said preference shares in excess of the nominal amount of "such shares shall only be provided out of profits which would "otherwise have been available for dividend on shares ranking "behind the said preference shares," and clause D of the article provided that: "The redemption price of a redeemable preference "share shall be the nominal amount of the share plus a premium "of 7s. per share and a sum equal to all (if any) arrears or "deficiency of the fixed cumulative dividend (less tax) and the "current fixed cumulative dividend (less tax) calculated down "to the date of repayment of capital." The clause also provided for certain additional payments to be made. In due course in December, 1947, the company redeemed the preference shares at the redemption price stipulated by the articles, viz., 27s. per share, together with a comparatively small sum equal to certain dividends in respect of which, however, the company made no claim.

A new issue of shares was made and the redemption price of the old preference shares was paid partly out of its proceeds and partly out of profits accumulated in the company's hands. For this purpose an agreement was made with certain brokers who in effect underwrote the issue. The result of the payment was to diminish the cash in hand on one side of the balance sheet. This was met first by cancelling the nominal capital value of the redeemed shares, which appeared on the other side, and then by diminishing the amount of a reserve account to the extent of 7s. per share.

An assessment to profits tax was made on the company, treating the payment of 7s. a share as having been "distributed" so that the non-distribution relief allowed in respect of profits tax under section 30 (2) of the Finance Act, 1947, was not allowed in respect of that sum. On appeal by the company, the Special

Commissioners held that the sum was applied in reducing the share capital within the meaning of the proviso to section 36 (1) of the Act and that the appeal should be allowed.

Sir Reginald Manningham-Buller Q.C., A.-G., C. Montgomery White Q.C., J. H. Stamp and *Sir Reginald Hills* for the appellants. The price of redemption of shares may exceed the reduction of capital involved in the transaction and the sum expended in reduction of capital is different from that price. Share capital can be reduced only by the payment or loss of money or money's worth out of it. No greater sum in money or money's worth can be paid or lost out of a sum of share capital than a sum equal to the nominal amount. So soon as its nominal amount has been applied in reducing it, it is reduced to nothing and no further sum can be applied in reducing it. The words "sum applied "in . . . reducing the share capital" in the proviso to section 36 (1) of the Finance Act, 1947, cannot be read as if the expression were "for the purpose of reducing" or "in connexion with "reducing" or "to reduce." The whole case turns on the interpretation of the proviso, which should be given its plain meaning. There is no relevant authority on the point. The Companies Act, 1929, applies to this case, and by the express terms of section 44 the company was bound to provide, and did provide, the premium paid on the redemption out of its profits before the shares were redeemed. It necessarily follows that the payment of the premium operated to reduce, not the company's capital but the fund of profits out of which it was provided. The redemption of the shares resulted in a reduction of share capital but the sum applied to that end was not necessarily applied in reducing the capital. Indeed, the sum applied in reducing the capital cannot exceed the amount by which the capital is reduced. The whole case turns on the distinction between the price paid for redeeming the shares and the expense of reducing the capital. The additional sum paid in respect of dividends under article 8 (D) forms part of the redemption price but that cannot be said to be applied in reduction of capital, nor can the other ingredient, the premium. It is vital to distinguish between the redemption price and the sum applied in reducing capital and between a sum expended *to reduce* capital and *in reducing* capital. *In re Serpell & Co. Ld.*[1] has not much bearing on this case, but in so far as it has any it is in the Crown's favour. See also *Ex parte Westburn*

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[1] [1944] Ch. 233; 60 T.L.R. 309.

Sugar Refineries Ld.[2] The proviso to section 36 (1) of the Act of 1947 is limited in its application to the actual sum applied in repaying a loan or reducing the share capital. Accordingly, the amount of non-distribution relief was rightly computed here by the appellants.

C. Montgomery White Q.C. following. It is false to distinguish between applying money in the sense of paying it and applying it in the sense of recording it in your books. The whole notion of share capital and of increasing or reducing share capital is an accountancy and balance sheet conception. The reduction of capital sends one to see what has been done in the company's accounts. What has happened there is that the share capital has been reduced by £1 and the balance of the profit and loss account has been reduced by the amount of the premium. One only begins to see what has happened in a given year when one makes up one's books. According to the balance sheet the premium has not been applied in reducing capital but in reducing some other asset balance. Thus £1 was applied in reducing the share capital and 7s. in reducing the amount of the reserve account. The 27s. can thus be split up, so that £1 was applied in redeeming the share and 7s. in compensating the shareholder for losing it. This would have been so even had the share been issued at a premium. There is a difference in the wording of the proviso to section 36 (1) and the final words of section 35 (1) because the latter is giving a relief to a company which is not reducing its capital and would not have reliefs under the former. *Trevor* v. *Whitworth*[3] was decided when company law was in its infancy when the current Finance Acts were not foreseen.

R. E. Borneman Q.C. and *Gordon Richardson* for the respondents. This is a very short point. Unless there is some good reason for departing from the ordinary significance of the relevant words, the Crown cannot succeed. The words must be construed as they stand. The accountancy approach to this case is wholly wrong because it arises from a misunderstanding of the structure and purpose of the Acts dealing with profits tax. The question is what is a distribution.

There is no reason in this case why the words of the proviso to section 36 (1) of the Act of 1947 should not be construed in accordance with the ordinary significance of words as they are used. One may ask: (1) Is the 27s. a "sum"? Yes. (2) Was it "applied"? Yes. It passed from the company to the shareholders. (3) Was it "applied in . . . reducing the share capital"? Yes; for the result achieved was the reduction of the share capital. Further, the act of redeeming the shares is the act of reducing the share capital or it is a way of reducing the share capital; it does not matter which way one looks at it. Redemption of shares is the same as the reduction of share capital: *In re Serpell & Co. Ld.*[4] The company has chosen redemption of shares as the way of reducing its capital. The only issue is that relating to the shares. The company does not claim in respect of the further sum equal to the dividends, although it might.

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[2] [1951] A.C. 625; [1951] 1 T.L.R. 728; [1951] 1 All E.R. 881.

[3] (1887) 12 App.Cas. 409; 3 T.L.R. 745.

The company's case stands or falls on the construction of the proviso to section 36 (1). There is no difference, in the ordinary accepted sense of English words, between "in reducing" and "to reduce." Thus, on the facts the sum applied in redeeming the shares and in reducing the share capital was the 27s. per share which the company was bound to pay under article 8 (D). It is not necessary that the amount by which the capital is reduced and the value of what is transferred to the shareholders should exactly correspond: *Ex parte Westburn Sugar Refineries Ld.*[5] This cuts the ground from under the Crown's construction of the proviso.

When the legislature wishes to distinguish between the nominal value of a share and its value together with a premium payable on redemption, it knows how to do it: see the differences in language between section 35 (1) and the proviso to section 36 (1) of the Act of 1947 and section 46 (1) (*c*) of the Companies Act, 1929, and section 71 (1) of the Companies Act, 1947. Section 46 (1) (*c*) uses the expression "a sum equal to the amount applied in "redeeming the shares," and section 71 (1) distinguishes between "a sum equal to the nominal amount of the shares redeemed" and "the amount applied in redeeming the shares." Compare this expression with "sum applied in . . . reducing the share "capital" in the Finance Act, 1947. The two Acts of 1947 were passing through Parliament at the same time.

What a company does when it redeems shares is to buy them back. What it does is not affected by the consequential adjustments in the books that follow. The fact that the fund of profits available for distribution is reduced is nihil ad rem. Ultimately the question is: How else could the company reduce its capital save by applying 27s. in redeeming each share?

The judgment of Hodson L.J. in the Court of Appeal is to be criticized on the ground that he assumes the answer to the question in issue and reaches his conclusion on an accountancy basis.[6] Singleton L.J. sums up the company's argument admirably.[7] See also Birkett L.J.[8]

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[4] [1944] Ch. 233.

[5] [1951] A.C. 625.

The act of redeeming the shares is the act of reducing the capital or it is a way of reducing it. The whole of the 27s. was applied to that act.

Gordon Richardson following. There is no necessary correspondence between the amount by which the capital is reduced and the amount applied in reducing it. If a company's £1 preference shares carried a rate of dividend of 3½ per cent. per annum and it proposed to issue new shares with a dividend of 4 per cent., it could, with the consent of the shareholders, put forward a reduction of capital whereby 17s. 6d. was paid on the shares and they were cancelled. Thus, though the capital was reduced by £1 a share, 17s. 6d. would have been applied in so doing. As to reduction of capital, see *Poole* v. *National Bank of China Ld.*[9]

Sir Reginald Manningham-Buller Q.C., A.-G. in reply. On the ordinary significance of these words the Crown must succeed. It is not argued that "applied in reducing" is the same as "applied to reduce." The difference is the same as between the words "in London" and "to London."

The accountancy approach is right. All through the profits tax provisions one is faced with questions of accountancy. The accounts reflect what has happened. This approach is useful and correct and the Act envisages it.

It is agreed that the 27s. was a "sum" and that it was "applied" in the sense of spent. The third question only is the material one: Was all the 27s. applied in reducing the capital or was 7s. of it applied as a premium? It is challenged that the price of redemption must be the amount applied in reducing the share capital. Redemption is not reduction, though the effect of redemption is the reduction of the share capital. The price of the redemption resulting in reduction is not necessarily linked with the reduction of the share capital. The whole controversy here is on this narrow point: Is the amount paid as the price of redemption to be treated as applied in reducing the share capital? The amount applied in the reduction cannot exceed the amount of the reduction made.

"Distributions" are defined in section 35 (1) of the Act of

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[6] [1954] Ch. 117, 129; [1953] 2 All E.R. 1592.

[7] [1954] Ch. 117, 123–4.

[8] Ibid. 127.

[9] [1907] A.C. 229; 23 T.L.R. 567.

1947. Section 36 (1) (*a*) (*b*) and (*c*) give three specific instances of distributions but distributions are not limited to these.

The Crown does not challenge that the 27s. is the price of redemption and admits that if the price paid for redemption is the same as the amount applied in reducing the share capital the relief must be allowed for the 7s. There is a simple test. Is the amount paid under article 8 (D) in respect of dividends applied by the company in reducing the capital? It is applied in redeeming the shares but not in reducing the capital. The two are not the same. Hodson L.J. recognized this distinction.

As to *Ex parte Westburn Sugar Refineries Ld.*,[10] one view of it is that it is an authority for the proposition that one may apply more than 20s. in value here in order to effect a reduction of capital. That is not challenged. But the only possible amount applied in that case in the reduction was 2s. a share, not the estimated value of the assets which lay behind the reduction. That case recognizes the accountancy principle.

The Crown relies on the concluding words of section 35 (1) of the Act of 1947, which show that when it is intended that an amount paid in respect of a premium shall not be treated as a distribution the Act so provides. This tax is based on income tax principles. The 7s. is a sum contributed by the shareholders. No inference favourable to the respondent company should be drawn from the proviso to section 36 (1).

The passages from the Companies Acts relied on by the company do not help them. The amount applied in redeeming shares is not necessarily the amount spent in reducing capital. On this point the Companies Acts throw little light. The fact that these two Acts of 1947 were going through Parliament at the same time has no significance because, having regard to parliamentary procedure, they were not related.

All one has to look at is the amount of the reduction. It is easy to say that the 7s. was applied in the reduction because it is part of the contractual purchase price conferring the right to redeem, but it is a fallacy. Hodson L.J. did not beg the question.

The object of the profits tax legislation is a tax on profits at a higher rate when they are distributed to proprietors. If the shares had been redeemed at 20s., paid entirely out of profits, relief would have been obtainable, but on redemption at 27s., paid entirely out of profits, relief cannot be obtained on the surplus 7s., for the premium payable on redemption is not a refund of money subscribed for the shares. If the sum is in excess of the nominal value of the shares, there has been a distribution of profits over and above the sum lent or subscribed. If such a distribution were possible without incurring the liability for higher tax there would be a serious gap in the provisions of the Act. On the ordinary strict use of language one can give a construction to the Act which does not produce that gap, and that construction should be adopted.

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[10] [1951] A.C. 625.

Their Lordships took time for consideration.

March 30. VISCOUNT SIMONDS. My Lords, this appeal raises a question of construction of a few words in the Finance Act, 1947, upon which the appellants invite your Lordships to reject the view entertained by the Commissioners for the Special Purposes of the Income Tax Acts and Upjohn J. and by the majority of the Court of Appeal.

The question arises upon an assessment to profits tax on the respondent company in respect of the profits of its business for the accounting period of 12 months ending September 30, 1948, and, shortly stated, it is whether the payment of a premium by the company on the redemption of certain £1 preference shares of the company was a "distribution" within the meaning of section 36 of the Act so as to restrict the non-distribution relief allowed in respect of profits tax under section 30 (2).

The shares in question were £1 shares redeemable under the articles of the company at 27s. per share, that is, at a premium of 7s. per share. It is common ground that relief must be given in respect of the £1; the dispute relates solely to the 7s. premium, the appellants contending that it is, and the respondent company that it is not, a "distribution" within the meaning of the section.

To explain the question further I think it necessary to refer only briefly to the Act. Profits tax was first imposed by the Finance Act, 1937, under the name "national defence contribution," and that name was changed to "profits tax" by the Finance Act, 1946. In 1947, by the Finance Act of that year, the scheme of the tax was amended and its rate varied. In particular, by section 30 (1) and (2), relief described as "non-distribution relief" was provided by way of reduction of the rate of tax upon so much of the taxable profit as is not covered by what is called in the Act "net relevant distributions to proprietors." I need not explain these somewhat turgid expressions except to say that they pave the way to the definition of "distribution" which is contained in section 36 (1) and is in the following terms: "Subject to the provisions of the next "succeeding subsection, wherever—(*a*) any amount is distributed "directly or indirectly by way of dividend or cash bonus to any "person; or (*b*) assets are distributed in kind to any person; or "(*c*) where the trade or business is carried on by a body cor"porate the directors whereof have a controlling interest therein, "an amount is applied, whether by way of remuneration, loans "or otherwise, for the benefit of any person, there shall be deemed "for the purposes of the last preceding section to be a distribu"tion to that person of that amount or, as the case may be, of "an amount equal to the value of those assets: Provided that no "sum applied in repaying a loan or in reducing the share capital "of the person carrying on the trade or business shall be treated "as a distribution."

Nothing else is involved in this appeal than to determine in relation to the facts of the case, which I will now state, what is the meaning of those few words "sum applied . . . in reducing "the share capital."

[His Lordship stated the facts, reciting article 8, clauses A and D, and continued:] I have stated this clause at some length because some argument was founded on it, but in this case the only concern is with the 7s. premium which by the terms of the article was payable only out of profits.

In due course in December, 1947, the company redeemed the preference shares at the redemption price stipulated by the articles, viz., 27s. per share, together with a sum equal to certain dividends. It is, I think, irrelevant to the question that a new issue was made in order to provide part of the redemption price and that for that purpose an agreement was made with certain brokers who in effect underwrote the issue. The only material facts were that the shares were redeemed at the stipulated redemption price and that quoad any excess over their nominal amount the payment was made, as it was bound to be, out of profits. In these circumstances an assessment to profits tax was made upon the company which treated the payment of the 7s. per share premium as having been "distributed" with the result that the company did not get relief in respect of the sum so paid. The company appealed to the Special Commissioners, who allowed the appeal, holding that the sum paid to the shareholders in respect of premium was a sum applied in reducing the share capital within the meaning of the proviso to section 36 (1), which

I have already set out. At the request of the present appellants the Special Commissioners stated a case for the opinion of the court, and their decision was upheld by Upjohn J. I think it worth while at this stage to pose the question as it appeared to the learned judge and to state his conclusion, since I find myself in complete agreement with him. " Ought one," he asked,[1] " as " the Crown says, to explore the application of this sum of 27s. " per share into the company's balance sheet, and find that 20s. " goes to reduce the capital and 7s. to reduce the profit and loss " account? Or ought one to treat the transaction as one and " take the view that, in order to get rid of these shares and " thereby reduce the capital by that amount, the company were " compelled by their articles to apply 27s. per share in reducing " their capital?" Having thus posed the question, the learned judge concludes: " A company may reduce its capital in many " ways, and one way is by redeeming its preference shares if so " authorized by its articles. To reduce the capital by that method " the company was bound by its articles to apply 27s. for every " £1 nominal of capital reduced." He therefore affirmed the decision of the Special Commissioners.

The Court of Appeal, to whom the case was then carried, affirmed the decision of the learned judge by a majority (Singleton and Birkett L.JJ., dissentiente Hodson L.J.). Singleton L.J. stated the question in a sentence[2]: " What amount did the " company 'apply' to reduce its capital?" Some criticism was levelled at the form of the question, and it is true that per incuriam the learned Lord Justice substituted " to reduce " for " in reducing," but it is clear that he was not making any distinction between the two phrases, for his conclusion was that the word " applied " in the proviso has the same meaning as " paid," and he proceeded thus[3]: " The company could not " redeem the preference shares unless they paid 27s. a share to " the holders of those shares. In paying that amount they were " applying it to redeem the preference shares and in reducing " the share capital of the company; thus the sum which they " paid was applied in reducing the capital of the company, and " does not fall to be treated as a distribution."

My Lords, the case for the company could not, I think, be put more concisely or cogently. Birkett L.J. agreed, emphasizing that the operation of reducing the capital and the operation of redeeming the preference shares were really indivisible since by the very act of redeeming the shares the capital was in fact reduced. Hodson L.J. dissented, and in his judgment will be found the argument which the appellants have pressed on your Lordships.

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[1] [1953] Ch. 499, 504; [1953] 2 All E.R. 133.

[2] [1954] Ch. 117, 123; [1953] 2 All E.R. 1592.

[3] [1954] Ch. 117, 123–4.

In the first place, the appellants rely on the use of the words "in reducing" and contend that they have a different meaning from "for the purpose of reducing" or "in connexion with "reducing" or even "to reduce." They then urge that the maximum sum which can be applied in reducing the capital of a company is the amount of the capital itself. Hodson L.J. propounds this as a mathematical truth, and, whether regarded as a matter of mathematics or not, it is a proposition to which the argument of the appellants continually recurs. Thus in the seventh of their formal reasons they urge that "share capital "can be reduced only by the payment or loss of money or "money's worth out of it and no greater sum in money or "money's worth can be paid or lost out of a sum of share capital "than a sum equal to the nominal amount: so soon as its nominal "amount has been applied in reducing it, it is reduced to nothing "and no further sum can be applied in reducing it."

This, my Lords, is, I think, the whole argument, though it may be elaborated and repeated in different forms, and I need hardly add that, as is usual in such cases, each side invokes the plain ordinary meaning of the English language, and claims that, judged by that test, the words can bear only one, but a different, interpretation.

My Lords, I think it worth while to pause for a moment and ask what effect the redemption of preference shares has upon the capital structure of a company. If I had any doubts upon this matter, they would have been set at rest by the decision of the late Lord Uthwatt (then Uthwatt J.), a judge particularly well versed in company law, in *In re Serpell & Co. Ld.*[4] In that case a company had an original capital of 110,000 7 per cent. redeemable preference shares of £1 each and 100,000 ordinary shares of £1 each. Of these preference shares 24,500 were redeemed before April, 1939. In 1943 the company resolved to reduce its capital, which, according to the resolution, then consisted of £185,500 divided into 85,500 7 per cent. redeemable preference shares and 100,000 ordinary shares of £1 each, to £100,000 divided into 100,000 ordinary shares of £1 each and that such reduction be effected by extinguishing the said redeemable preference shares. Upon a petition to the court to sanction the reduction the question arose whether the 24,500 preference shares which had been redeemed in 1939 continued to form part of the capital of the company, a question which might be posed in another way by asking what in law is the effect of redemption of redeemable preference shares upon the capital of a company. The learned judge held, and in my opinion rightly held, that, where redemption has been effected, the shares redeemed disappear for every purpose, that the nominal as well as the issued and paid up capital represented by the redeemed shares disappears and that in the instant case "the redemption of cumulative preference "shares effected some years ago reduced the nominal, as well as "the issued and paid-up, capital of the company."[5] My Lords, this means nothing else than that the act of redemption itself reduces the capital: reduction does not in this case depend on any sanction of the court, nor is it imperfect until its effect has been disclosed in a balance sheet which is adjusted to the new capital conditions. This analysis appears to me to justify the proposition advanced by the respondent company that redemption of preference shares is a way of reducing the capital of a company, and it may be added that by 1947 it was a familiar way of doing so.

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[4] [1944] Ch. 233; 60 T.L.R. 309.

I turn, then, to the present case and must proceed on the footing that, when the respondent company redeemed its preference shares in 1947, it by that act reduced its nominal and issued capital by £400,000. I must then ask what sum it applied in so reducing its capital. That seems to me a pure question of fact. So long as the provisions of the Companies Act, which are intended to safeguard the rights of creditors, shareholders and the public, are observed, it is open to the company to make what bargain it likes with its preference shareholders as to the terms of redemption, and the sum of money which it applies in the redemption will depend on those terms. It is obvious that that sum may or may not correspond with the nominal amount of the redeemed shares. But, whatever the sum may be, it is a sum applied in the redemption and, since redemption is itself a way of reduction, I cannot escape the conclusion that it is applied in reduction of the capital of the company. It may well be that, as a matter of accountancy, if the sum so applied is larger than the nominal amount of the redeemed shares, some other alteration must be made in the balance sheet beyond the change in the capital structure. But this is, in my opinion, irrelevant to the question what sum was applied in reducing the capital. Your Lordships were referred to the case of *Ex parte Westburn Sugar Refineries Ld.*,[6] and it has this importance, that this House there decided that in a reduction of capital it is competent for a company to pay off share capital by transferring to the shareholders assets of which the value may exceed the amount by which the share capital is reduced, and that the court should sanction the reduction provided that it is satisfied as to the safeguarding of the creditors, the shareholders and the public. From this it clearly emerges that there need be no precise correspondence between the amount by which the shareholders' capital is reduced and the value of that which is transferred to them, even though the latter exceeds the former. It need, therefore, cause no surprise if the "sum "applied in reducing capital" exceeds the amount by which the capital is nominally reduced.

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[5] [1944] Ch. 233, 235.

I have not so far referred to the immediate context of the words that I have had to construe, and without them I have come to a clear conclusion in favour of the respondent company. But they certainly support that conclusion; for, if I have to ascertain what sum has been "applied in repaying a loan," I do not merely ask what sum has been loaned or lent but ask also what sum has been applied in repaying it. I do not conceive that it is even arguable that, if (say) debentures have been issued at a discount, any sum less than that which according to their terms has to be paid and has in fact been paid in discharging them, has been "applied in repaying" the loan. It is the facts of the transaction which determine what sum is brought within the scope of the proviso, and this applies, in my opinion, equally to repayment of a loan or reduction of capital.

Finally, my Lords, counsel for the respondent company called in aid the contrasting language of the proviso to section 36 (1) and the final words of section 35 (1) and also of section 46 of the Companies Act, 1929, and section 71 of the Companies Act, 1947. His purpose was to show that the legislature, when it wished to do so, knew how to distinguish between the nominal amount of a share and that amount together with a premium payable upon its redemption. This is an assumption which I do not hesitate to make, but I do not find it necessary to rely on it for the purpose of construing the words of the proviso.

I have only to add, in view of some of the arguments addressed to us, that in this appeal we are concerned only with the premium which was payable on redemption of the preference shares. The stipulated redemption price contained other ingredients also. There may be special considerations applying to them which were not brought to our notice, and nothing that I have said should prejudice any future discussion of them.

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[6] [1951] A.C. 625; [1951] 1 T.L.R. 728; [1951] 1 All E.R. 881.

The appeal must be dismissed with costs.

LORD PORTER. My Lords, I have had an opportunity of seeing the speech just delivered by the noble Lord on the Woolsack, and I find myself in agreement both with its reasoning and conclusion. In those circumstances I have not thought it necessary to write any special opinion myself.

LORD MORTON OF HENRYTON. My Lords, I entirely agree with the speech which has just been delivered from the Woolsack, but out of respect for Hodson L.J., who dissented in the Court of Appeal, I shall add a few words upon a sentence which is, I think, the central point of his judgment. The learned Lord Justice said [7]: "As a matter of arithmetic the maximum sum which can be "applied in reduction of the capital is the amount of the capital "itself, namely £1 per share." I would, of course, agree with the proposition that as a matter of arithmetic the maximum sum *by which the capital can be reduced* is the amount of the capital itself, namely £1 per share; but the proposition as stated by Hodson L.J. is not merely arithmetic, but carries within it a decision of the very question which arose for determination. In my opinion, it is quite possible to apply a greater sum than £1 in reducing the capital by £1, and that is exactly what was done in the present case.

Disregarding on this appeal the other sums mentioned in article 8 (D), since no question arises on this appeal in regard to them, under that article the company could only redeem a £1 share by paying 27s. to the holder thereof. That sum was in fact paid. This transaction was undoubtedly a purchase by the company of one of its own shares, and it is, to my mind, a correct use of language to say that the company applied 27s. in purchasing each £1 share. Moreover, by one and the same transaction the company achieved two results, namely, the purchase of a £1 share and the reduction of its capital by £1. See *In re Serpell & Co. Ld.*[8] It thus follows, as I think, that it is equally correct to say that the company applied 27s. in reducing its capital by £1.

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[7] [1954] Ch. 117, 129.

[8] [1944] Ch. 233.

My Lords, I do not think that the contrary argument is at all assisted by reference to the company's balance sheet. The 27s. is " applied," once and for all, when the purchase takes place, and that sum has all come out of the company's pocket. I refrain from developing this point further, as it has been fully dealt with by my noble and learned friend on the Woolsack. I agree that the appeal must be dismissed with costs.

LORD REID. My Lords, the only question raised in this appeal is whether the whole of the 27s. per share paid by the respondents to redeem 400,000 preference shares of £1 each comes within the scope of the proviso to section 36 (1) of the Finance Act, 1947, which is in these terms: " Provided that no sum applied in repaying a loan or in reducing the share capital of the person carrying on the trade or business shall be treated as a distribution." The appellants admit that 20s. of the 27s. per share was applied in reducing the share capital of the respondent company but deny that the remaining 7s. per share was so applied.

The question turns, in my opinion, on what is meant by a sum applied in reducing share capital, and particularly on the meaning of the word " applied " in this context. The proviso has nothing to do with the amount of profit on which profits tax is to be assessed: that is to be determined on income tax principles and it may not be the actual profit. But after the amount of profit has been determined it is necessary to find the amount of distributions to shareholders because that affects the rate of tax. Distributions are actual payments in money or money's worth, and I did not understand it to be disputed that the purpose and effect of the proviso is to enact that certain actual payments to shareholders which would otherwise be distributions within the meaning of the Act are not to be treated as distributions. As the proviso is dealing with actual payments to shareholders, it appears to me that the natural meaning of the words " no sum applied " is " no sum paid by the company to its shareholders," and that this should be held to be their meaning unless there is some compelling reason for giving to them some wider or different meaning. The proviso is concerned with sums paid and not with the source from which the company takes the money or with the entries which the company has to make in its accounts and balance sheet consequential on the money being paid.

The company paid 27s. per share to its shareholders and the question is whether that money was paid in reducing the share capital or whether part of it was paid in doing something else.

The articles of association of the company entitled the company to redeem these shares and provided that the redemption price should be the nominal amount of the shares plus a premium of 7s. per share and a further sum calculated with reference to dividends. In fact the company paid a comparatively small sum so calculated in addition to the 27s. per share, but the company has made no claim in respect of this additional sum and I have formed no opinion about it. I shall consider the case on the footing that the stipulated redemption price was 27s. per share and no more.

In my opinion, the necessary and immediate effect of paying this sum of 27s. per share to the shareholders was to cancel the shares in respect of which it was paid and so to reduce the share capital of the company by the nominal amount of these shares. I think that this follows from the judgment of Uthwatt J. (as he then was) in *In re Serpell & Co. Ld.*,[9] and I agree with that judgment. Moreover, the shares could not have been redeemed and the share capital could not have been reduced by any smaller payment. A payment of 20s. per share would not have been effectual to redeem the shares, and so would not have resulted in reducing the share capital. But the payment of 27s. per share was effectual in reducing the share capital and the whole of it was required to effect that result. I cannot see how it can be said that only part of the money was paid or applied in reducing the share capital, and I do not see what else the balance can be said to have been paid or applied in doing.

An argument was submitted to the effect that the 27s. per share could be split up, and that 20s. per share could be regarded as having been paid in redeeming and cancelling the share and 7s. per share could be regarded as being compensation to the shareholder for losing his share. This is not an argument that the stipulated redemption price is to be split between the price originally paid for the share and the excess over that price: these shares might have been issued at a premium, say at 22s. per share, but counsel for the appellants made it clear that the argument would still have been that only 20s. was paid in cancelling the share, the remainder being paid in doing something else. The argument appears to me to be artificial and invalid because, as I have said, a payment of 20s. by itself would have achieved nothing, and the whole price of 27s. was paid in doing one thing and one thing only—redeeming the shares and thereby reducing the share capital.

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[9] [1944] Ch. 233.

The appellants also submitted an argument to the effect that "applied" does not mean paid to the shareholder, but means applied in the company's accounts, so that the sum applied in reducing the share capital is only that part of the redemption price which is applied for this purpose in the company's balance sheet. We do not have the company's accounts before us, but it appears that what happened was that there was a new issue of shares and the redemption price of the old preference shares was paid partly out of the proceeds of the new issue and partly out of accumulated profits in the hands of the company. The result of the payment was to diminish the cash in hand on one side of the balance sheet, and this was met first by cancelling the nominal capital value of the redeemed shares which appeared on the other side, and then by diminishing the amount of a reserve account: it would be met to the extent of 20s. per share by cancelling the nominal capital value of the shares, and to the extent of 7s. per share by diminishing the amount of this reserve account. The argument, as I understood it, was that the 27s. per share was "applied" when the necessary alterations were made on the liabilities side of the balance sheet; in that view 20s. was applied in reducing the nominal amount of share capital, and 7s. was applied in reducing the amount of the reserve account. Of course, if this were right, no more than 20s. per £1 share could ever be applied in reducing the nominal share capital. But I am quite unable to agree with the argument. It appears to me to be an unnatural use of the word "applied" to say that a sum paid out by a trader is applied in diminishing some item which appears on the liabilities side of his balance sheet: the sum has already been applied in paying it and the consequent entries in his accounts merely disclose the consequences of its having been so applied. That the word is not used in the proviso in the sense for which the appellants contend is apparent from its initial words: "provided that no sum applied in repaying a loan . . ." That appears to me clearly to indicate that the sum repaid is "applied" when it is paid to the lender, and not when the liability to make the repayment is deleted from the balance sheet. In my judgment, the sum of 27s. per share was applied in this case in reducing the share capital of the respondent company, and therefore this appeal should be dismissed.

LORD COHEN. My Lords, I respectfully agree with your Lordships that this appeal should be dismissed.

The effect of the proviso to section 36 (1) of the Finance Act, 1947, is that for the purposes of the provisions of the Act relating to reliefs from profits tax for non-distribution and to distribution charges "no sum applied in repaying a loan or in "reducing the share capital of the person carrying on the trade "or business shall be treated as a distribution." The parties are agreed that these words must be construed according to their ordinary meaning, but they differ as to that meaning. The Attorney-General says that the sum applied in reducing the share capital cannot exceed the amount by which the capital is reduced. Mr. Borneman, for the respondents, argues that on the facts of this case the sum applied in reducing the share capital is at least the 27s. per share which the respondent company is bound to pay under paragraph (D) of article 8 of its articles of association.

The argument of the Attorney-General is at first sight attractive since it is plain that share capital cannot be reduced by more than the amount paid up thereon, and as a matter of accountancy, and indeed under the terms of section 46 of the Companies Act, 1929 (the Act in force at the date of the transaction under consideration), the 7s. premium had to be found out of accumulated profits. But the argument seems to me to ignore the words of the proviso which direct that the sum applied in reducing the share capital, not the sum by which the share capital is reduced, shall not be treated as a distribution.

As a matter of English, I think any layman would say that the whole redemption price payable under paragraph (D) of article 8 of the articles of association of the respondent company was a sum applied in reducing the share capital of the company, and I see no reason why a lawyer should differ in this matter from the layman.

I am fortified in this conclusion by the fact that, as is plain from the decision of Uthwatt J. in *In re Serpell & Co. Ld.*,[10] redemption is a way of reduction of capital. If that be so, it seems to me reasonable to conclude that the redemption price is a sum applied in reducing the capital. Like Upjohn J., I think the proper approach to this question is to treat the whole of what was done as one transaction and to say that in order to get rid of the shares in question and thereby reduce the capital by the amount paid up thereon the company were compelled by their articles to pay 27s. per share and that sum was therefore money applied in reducing the capital.

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[10] [1944] Ch. 234.

In the course of the argument a question was raised as to the position in relation to the sum equal to all (if any) arrears or deficiency of the fixed cumulative dividend (less tax) and the current fixed cumulative dividend (less tax) down to the date of repayment of capital which under article 8 (D) had to be added to the 27s. But no such question was raised before the Special Commissioners, and I prefer to express no opinion as to how that sum should be regarded for the purposes of the proviso to section 36 (1) of the Finance Act, 1947.

Some reliance was placed by both sides on the concluding words of section 35 (1) which deal with the position as regards gross relevant distributions in the case of the last chargeable accounting period in which the trade or business is carried on. They provide that any excess over the paid-up share capital together, where shares have been issued at a premium for cash, with the aggregate of the amounts of the premiums, shall not be treated as a distribution of capital for the purposes of section 35 (1) (*c*). The Attorney-General said that this showed that when the intention was that an amount paid in respect of a premium should not be treated as a distribution of profits, the Act so provided. I am, however, unable to derive any assistance from this part of section 35 (1). It deals with the position in a liquidation when every distribution is strictly a distribution of assets, not of profits, and it imposes a necessary limitation for the protection of the revenue. I cannot rely on it as throwing any light on the proviso to section 36 (1) which deals with the position while the company is a going concern.

Appeal dismissed.

Solicitors: *Solicitor of Inland Revenue; Linklaters & Paines.*

F. C.

END OF VOLUME AND OF APPEAL CASES FOR 1955.

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